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Abstract

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

311 A. 1^{2d}

General No. 10349

Agenda No. 19

Ruth V. Chalmers,

Plaintiff-Appellee,

vs.

Appeal from the
Circuit Court of
Champaign County.

W. Ellison Chalmers,

Defendant-Appellant.

REYNOLDS, J.

This cause comes to this court on the appeal of the defendant-appellant from the order of the Circuit Court of Champaign County denying his motion to modify the decree for alimony entered in the cause in 1951, as amended in 1957. Originally, defendant was ordered to pay to the plaintiff-appellee the sum of \$350.00 per month, or one-half of his gross income, which ever was the greater, as alimony. Custody of the two children, Douglas and Margaret, was awarded to the plaintiff. The defendant was also required by the

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decree to surrender all right to an insurance policy, but was ordered to continue paying the premiums on the policy which amounted to approximately \$7.00 per month. Defendant remarried in 1951 and by this second marriage has one child. In 1957, it was stipulated and agreed that the decree should be modified and the monthly payment of alimony was fixed at \$400.00 per month, plus the insurance payment and a decree so modifying was entered. At the time of the modification of the decree in 1957, the son Douglas was 25 years of age and Margaret was 18. Douglas is now working for his doctor's degree but Margaret has completed her education. Both children are married, neither one lives with the mother, and there is no evidence that she contributes anything for their support or education. The defendant is 57 years of age and the plaintiff is 58. At the time of the divorce in 1951, defendant was making \$7500.00 a year. In 1957, his salary had increased to \$11,120.00. In 1960 he was making \$14,100.00 which would be increased this year to \$14,900.00. His take home pay, at the time of the petition for rehearing in 1960, was \$931.00 per month. Out of that he paid the plaintiff \$400.00 and paid \$7.00 for insurance or

a total of \$407.90 per month, leaving him \$524.00 to live on and support himself, his wife and child. Plaintiff offered no testimony but admitted by her answer that her income was \$4500.00 per year, plus the alimony payments from the defendant. The defendant estimated the plaintiff's income, taking into consideration the income tax on such income, at \$586.00 per month. This estimate was not disputed.

The power of the court to modify the terms of a decree as to alimony and maintenance, as shall appear reasonable and proper, is provided for in the Statute. Chapter 40, Section 19, Illinois Revised Statutes. Our courts have laid down the rules upon which such modification shall be made. It must be shown that conditions and circumstances of the parties have materially changed since the entry of the decree, so as to make the modification equitable. Mayes v. Mayes, 23 Ill. App. 2d 513; Cole v. Cole, 142 Ill. 19; Cahill v. Cahill, 316 Ill. App. 324; Herrick v. Herrick, 319 Ill. 146. But when substantial changes in the conditions and circumstances of the parties render modification necessary, the court has the power to so modify. Larson v. Larson, 21 Ill. App. 2d 264; Garrett v. Garrett, 252 Ill. 318. The power to make modifications in the allowance of alimony under

the Divorce Act is not exhausted by the entry of the original decree fixing alimony, but is a continuing power to be exercised in accordance with the needs and circumstances of the parties. Larson v. Larson, 21 Ill. App. 2d 264; De La Cour v. De La Cour, 363 Ill. 545. The court is not bound by any agreement between the parties, and when the decree is entered, the agreement of the parties is merged into the decree. Jacobs v. Jacobs, 328 Ill. App. 133. Any agreement of the parties as to property settlement or alimony must have been deemed to have been made in view of the right of the court to modify when justified. Maginnis v. Maginnis, 323 Ill. 113; Herrick v. Herrick, 319 Ill. 146. But the courts can not arbitrarily or capriciously alter or change decrees involving alimony. There must be changes in the conditions and circumstances of the parties. Mayes v. Mayes 23 Ill. App. 2d 513. Broadly, these changes rest upon the financial ability of one and the financial needs of the other. It may rest upon the physical conditions of one or the other. The property and income of the parties, their ages, health and social conditions, and whether there are children dependent upon one or both of them for support, are factors that are considered by a court on a petition for modification of the decree for alimony.

The District is not satisfied by the effect of the stipulation
 entered into, and is a continuing power to be exercised
 in accordance with the nature and circumstances of the parties.
People v. Latham, 11 Ill. App. 2d 104; People v. Latham, 11 Ill. App. 2d 104.
 The 111. 144. The court is not bound by any stipulation between
 the parties, and when the justice is required, the stipulation of
 the parties is waived into the court. People v. Latham, 11 Ill. App. 2d 104.
 111. App. 115. Any stipulation of the parties as to procedure
 or stipulation of stipulation must have been deemed to have been made
 in view of the fact of the court to modify, when justified.
People v. Latham, 11 Ill. App. 2d 104; People v. Latham, 11 Ill. App. 2d 104.
 111. App. 115. But the court may not arbitrarily or capriciously enter
 or change orders involving stipulation. There must be reasons in
 the conditions and circumstances of the parties. People v. Latham, 11 Ill. App. 2d 104.
 111. App. 115. Stipulation, these stipulation must have been
 stipulation of stipulation and the stipulation must be the stipulation.
 It may rest upon the stipulation of one or the other.
 The stipulation and nature of the parties, their stipulation, and
 stipulation of stipulation, and whether there are stipulation dependent upon
 one or both of them for stipulation, are stipulation that are stipulation in
 a court on a stipulation for stipulation of the parties for stipulation.

Gilbert v. Gilbert, 305 Ill. 216; Decker v. Decker, 279 Ill. 300; Herrick v. Herrick, 319 Ill. 146. The measure of the sum of alimony necessary is the need of the wife and the ability of the husband to pay. Herrick v. Herrick, 319 Ill. 146.

Alimony is based on the social and economic theory that a man must support his wife. It is carved out of the husband's estate or earnings. It does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction, which may be altered by that court at any time, as the circumstances of the parties may require. Cahill v. Cahill, 316 Ill. App. 324; Welty v. Welty, 195 Ill. 335. It may be stated generally that whenever, for any cause, the alimony decreed becomes unnecessary for the support of the former wife, or when circumstances arise which make it inequitable that she should have a further allowance, it is proper for the court to absolve the divorced husband from the burden imposed by the decree. Macinnis v. Macinnis, 323 Ill. 113. It is equally proper for the court to lessen the burden imposed by the decree when circumstances

The first of these is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. The second is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York. The third is the fact that the defendant has been found guilty of a crime which is a felony under the laws of the State of New York.

make such lessening equitable. However, in discussing the powers of the court to modify the decree, we must not lose sight of the rule that requires a change in the circumstances and conditions of the parties before such modification is proper. The case of Mayes v. Mayes, 23 Ill. App. 2d 513, involved similar points and this court said in that case: "The trial court had power to modify the decree of November, 1954, if subsequent changes in the conditions and circumstances of the parties rendered modification necessary. The decree should not have been modified unless it was shown that the conditions and circumstances of the parties had materially changed since November, 1954. As applied to the situation confronting the court in this particular case, this would have required a showing that the needs of the wife had decreased or that the ability of the husband to pay had decreased. The record discloses that neither factor is present. And in passing, the remarriage of the plaintiff does not alter this requirement. Stewart v. Stewart, 1 Ill. App. 2d 283, 117 N.E. 2d 579."

In this case the only changes in the conditions and circumstances of the parties that can be considered, are the changes that have occurred since the stipulated and agreed modification of

under such favorable conditions. However, in discussing the
 course of the court to reach the decision, we must not lose
 sight of the fact that the court is the final authority
 and condition of the court's action is not subject to appeal.
 The case of *Smith v. Smith*, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In this case the only course in the condition and the
 condition of the office that can be considered, the only course
 that has been taken since the condition and the condition of

the decree in June 1957. At that time the defendant's gross annual income was \$11,120.00. Since then the defendant's income has increased and at the time of the hearing he was making \$14,100.00 and is now making \$14,900.00 per year. It would appear from the stipulated order of 1957, that at that time, it was necessary for the plaintiff to have the \$400.00 per month agreed upon, plus any other income she may have had, to meet her needs. There is no evidence to show that her needs have decreased or changed. It is true that there was some evidence to show that the two children of the defendant and plaintiff have completed their education so far as need of help is concerned. However, there is nothing in the record to show how this changes the needs of the plaintiff. The heart condition of the defendant was known in 1957 and there has been no change in this condition. The nearness of retirement age, while nearer than it was in 1957, was a matter that was known and undoubtedly considered in the modification of 1957. The re-marriage of the defendant does not alter this requirement. The case of Stewart v. Stewart, 1 Ill. App. 2d 283, at page 286, said: "The obligation to pay is not removed by the obligor's subsequent marriage, although the effect may be to deprive a second wife

the decree in June 1937. At that time the defendant's first annual income was \$11,100.00, which then the defendant's income was decreased and at the time of the hearing he was being \$11,100.00 and is now being \$14,800.00 per year. It would appear from the stipulated order of 1937, that at that time, it was necessary for the plaintiff to have the \$1200.00 per month amount, plus any other income she may have had, to meet her needs. There is no evidence to show that her needs have decreased or changed, it is true that there was some evidence to show that the two children of the defendant and plaintiff have completed their education so far as need of help is concerned. However, there is nothing in the record to show how this changes the needs of the plaintiff. The needs of the defendant are known in 1936 and there has been no change in this condition. The amount of retirement age, while earlier than it was in 1937, was a matter that was known and undoubtedly considered in the modification of 1937. The retirement of the defendant does not alter this retirement. The case of Wright v. Wright, 121. App. 2d 103, 104 page 103, said: "The obligation to pay is not removed by the wife's remarriage or divorce, although the effect may be to deprive a second wife

of her current means of support." Here, the defendant had married and had a child by the second wife. While his obligations were increased, the evidence shows his ability to pay, by increased salary, had also increased. In considering the proof it does not appear that there were any changes in the conditions and circumstances of the parties subsequent to the modification order of 1957, that would justify modification.

From a legal standpoint, the first come first and second come second. In other words, the first obligations must be met before the second obligations can or will be considered. The changes in conditions or circumstances should be involuntary and not voluntary. To hold that a defendant, charged by a decree to pay alimony to a former wife, could change the amount to be paid by involving himself with other obligations, would be to nullify the decrees and orders of the court.

The abstract of record furnished by the defendant is attacked by the plaintiff on the ground that it is not properly abstracted as to evidence, and that it fails to set out the modification decree of 1957. While this court does not approve of the form of the abstract as to the evidence, yet it is not sufficient error to warrant this court to dismiss the appeal. Abstracting

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the testimony is for the convenience and aid of the reviewing court and if the testimony was voluminous, the court might be inclined to adopt a stricter interpretation of the rules, but in this case the evidence is short. As to the failure to set out the modification decree of 1957, the plaintiff has the right to supply this deficiency.

The order of the chancellor denying the modification of the decree will be affirmed.

Affirmed.

CARROLL, P.J. and ROETH, J., concur.

[illegible]

THE SECRETARY OF THE ARMY

CARROLL, J. JAMES 1841-1917

Adv-83151

Abstract

A

No. 11445

Publish Abstract Only

Agenda No. 12

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
OCTOBER TERM, A. D. 1960

FILED
JUL 6 - 1961

PAUL V. WUNDER
Clerk Appellate Court Second District

FEDERAL INSURANCE COMPANY,
a corporation,

Plaintiff-Appellee,

vs.

MERRILL E. AINSWORTH,

Defendant-Appellant.

Appeal from the

Circuit Court of

Winnebago County.

SMITH, P. J.

Plaintiff's action is on a written agreement. After trial before a jury it obtained a judgment for \$855.26. Because of the nature of the many errors assigned by defendant for remandment or outright reversal we will consider the entire proceedings from start to finish.

The complaint begins: "Now comes Federal Insurance Company, a corporation, plaintiff". Numbered paragraphs follow, their essence being, that defendant as an employee of a company during certain years wrongfully exceeded his disbursing authority, that plaintiff pursuant to an insurance policy had reimbursed the company for the loss, and that defendant in

Abstract

Publish Abstract Only

No. 1112

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

OCTOBER TERM, A. D. 1960

FILED

JUL 6 - 1961

PAUL V. WUNDER
Clerk Appellate Court, Second District

WERNER ENGINEERING COMPANY,
a corporation,

Plaintiff-Appellee,

Appeal from the

Circuit Court of

Winnebago County,

WERNER ENGINEERING COMPANY,

Defendant-Appellant.

SALVO, J. L.

Plaintiff's motion is on a written agreement. After trial before

a jury it obtained a judgment for \$500.00. Because of the nature of the

case there was no evidence of defendant's conduct or of its reversal

we will consider the entire proceedings from start to finish.

The complaint alleges: "Now comes Federal Insurance Company,

a corporation, plaintiff. Paragraphs follow, their contents are

that, and defendant as an employee of a company owned certain parts which

fully exceeded his discharging authority, and plaintiff pursuant to an order

such policy and defendant's company for the loss, and plaintiff herein is

turn agreed in writing to reimburse plaintiff but hadn't. The agreement reads:

Denver, Colo. June 28, 1954

I have received the audit made by C. Wilson Audits and Results Accountant which is partially completed on my activities as a disbursing employee which shows a shortage of \$992.06 as of today and may increase on completion of the audit. This is partially offset by assigning my last pay check and expense check in the amount of \$145.55. I realize that this was wrong and I agree to make restitution to the Federal Insurance Co. in small payments as soon as I have employment.

/s/ Merrill E. Ainsworth

Defendant responded to the complaint with a motion to strike, asserting the failure of plaintiff to file security for costs, the failure of the complaint to state a cause of action, and that plaintiff was not "the proper party plaintiff". This motion was denied. Defendant answered by general denials but admitted the execution of the written instrument. In addition he raised two affirmative defenses. One alleged a lack of consideration and the other duress. Plaintiff did not within the time allowed by Supreme Court Rule 8 (3) file a Reply, but did so on the day of trial, after obtaining leave to do so over defendant's objection. Defendant's counsel on the same day moved for a continuance, assigning defendant's absence and that if present he would testify "to all the facts which are material, relevant and competent to a complete defense of the allegations of the complaint". This motion was denied. Plaintiff called one witness, defendant none. This witness, a former attorney for plaintiff, testified to two conversations with defendant, in which defendant admitted the genuineness of his signature, the contents' correctness, the lack of payment, and his employment at various times subsequent to the

turn agreed in writing to reimburse plaintiff but hadn't. This agreement

reads:

Denver, Colo. June 28, 1954

I have received the audit made by C. Wilson Smith and Leslie Accountant which is partially completed on my activities as a dispensing employee which shows a shortage of \$52.00 as of today and may increase on completion of the audit. This is partially offset by cashing my last pay check and expense check in the amount of \$145.00. I realize that this was wrong and I agree to make restitution to the Federal Insurance Co. in small payments as soon as I have employment.

Respectfully,
C. Wilson Smith

Defendant responded to the complaint with a motion to strike,

asserting the failure of plaintiff to file security for costs, the failure of the

complaint to state a cause of action, and that plaintiff was not the proper

party plaintiff. This motion was denied. Defendant answered by general

denial but admitted the execution of the written instrument. In addition, he

raised two affirmative defenses. One alleged a lack of consideration and the

other duress. Plaintiff did not within the time allowed by Supreme Court

Rule 6 (3) file a reply, but did so on the day of trial, after obtaining leave

to do so over defendant's objection. Defendant's counsel on the same day

moved for a continuance, asserting defendant's absence and that if present

he would testify to all the facts which are material, relevant and competent

to a complete defense of the allegations of the complaint. This motion was

denied. Plaintiff called one witness, defendant none. This witness, a former

attorney for plaintiff, testified to two conversations with defendant, in which

defendant admitted the genuineness of his signature, the contents, correctness,

the lack of payment, and the illegality at various times subsequent to the

date the agreement was signed. Defendant's post-trial motion realleged all of his prior objections, and went on to assign further error in the admission of evidence, the insufficiency of the evidence in regard to proof of consideration, delivery and acceptance, and the invalidity of the verdict because it exceeded the amount shown in the agreement by \$8.75. This motion was denied. A motion to vacate the judgment assigned again the matter of security for costs. This motion was denied, but security was then posted by plaintiff. These many and various reasons have all been briefed for us.

The motion to strike was properly denied. The complaint states a cause of action in plaintiff, and plaintiff's capacity to possess one. There is admittedly no numbered allegation that the plaintiff is a corporation, but as we have seen, the introductory paragraph does say so. Section 21 of the Civil Practice Act (Sec. 21 (4), Chap. 110, Ill. Rev. Stat., 1955) dealing with designation of parties states: "A party shall set forth in the body of his pleading the names of all parties for and against whom relief is sought thereby". While it might have been better form for plaintiff to have shown by specific averment its corporate status, the introductory paragraph does so identify it, and this is, from our view, a sufficient designation "in the body of his pleading". In any event, the motion to strike the complaint makes no specific allusion to this argued deficiency of capacity to sue. Section 45 CPA reads that in objecting to pleadings, "The motion shall point out specifically the defects complained of * * *", and Section 42 (2) CPA states that no pleading "is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim * * * which he is called upon to meet". While defendant urged as one of his reasons, that "the plaintiff is not the proper

that the agreement was signed. Defendant's post trial motion challenged all of his prior testimony, and went on to allege further error in the admission of evidence, the sufficiency of the evidence, and the jury's verdict of conviction, delivery and acceptance, and the invalidity of the verdict because it excluded the material shown in the agreement by 82.77. This motion was denied. A motion to vacate the judgment against the matter of evidence for error. This motion was denied, but security was then posted by plaintiff. There may be and various reasons why it was denied for us.

The motion is said to be primarily denied. The complaint states a cause of action in equity, and plaintiff's capacity to prosecute same. There is admittedly no necessary allegation that the plaintiff is a corporation, but as to this issue, the introductory paragraph does say so. Section 41 of the Civil Practice Act (Sec. 41 (1), Chap. 143, W. Stat., 1932) dealing with description of parties states: "A party shall set forth in the body of the pleading the names of all parties for and against whom relief is sought or sought against, and while it might have been better to have shown by specific reference to the corporate status, the introductory paragraph does so generally, and this is, from the very nature of the description in the body of the pleading." In any event, the motion to set aside the complaint makes no specific allegation to the alleged deficiency of capacity to sue. Section 43 CIV. Pr. Act states that in objecting to pleadings, "the objector shall point out specifically the defects complained of," and Section 43 (2) CIV. Pr. Act states that no pleading "is held in abeyance unless specific and relevant information is furnished in support of the objection." The nature of the claim ** which he is called upon to meet. While defendant urged as one of his reasons, that the plaintiff is not the proper

party plaintiff", this was not specifically pointing out plaintiff's lack of standing to sue, rather, it raised the point that the complaint did not show any cause of action in plaintiff. Be that as it may, we hold that there was a sufficient designation of the plaintiff as a corporation to meet the requirements of Section 21 (4) CPA. Does the complaint, with Sec. 42 (2) yardstick in mind, state a cause of action, remembering, of course, that defendant's attack can be more appropriately characterized as general, rather than one "specifically" pointing out the defects complained of. We think it does. The Complaint states an action at law to collect a debt predicated on a written agreement. This is the most ancient of actions and it is not apparent to us why the information disclosed does not reasonably inform defendant of the nature of plaintiff's claim. If he wanted more details the rules provide for appropriate motions to that end.

Defendant complains that no consideration for the agreement was pleaded or proved. But the contract itself together with the facts pleaded and proved, import that consideration which flows from the act of one party forbearing to pursue a right against another. The important words in the agreement are: "I agree to make restitution * * * in small payments as soon as I have employment". In plaintiff's view it initially had a valid, equitable claim against defendant. Plaintiff did not have to delay the pursuit of this claim until defendant found "employment", and then to be satisfied with "small payments". But it agreed to do so in return for the promise to pay. This is a forbearance on the part of plaintiff and forbearance is a valuable consideration. In 12 Ill. L. and P. 249, Sec. 90, Contracts, it is said:

"Forbearance to exercise or pursue a right or claim or an agreement to forbear may constitute a sufficient consideration to support a promise or agreement, provided the claim is entertained in good faith."

particular, this was not specifically holding out plaintiff's lack of standing to the court. In fact, it raised the point that the complaint did not show any cause of action in fact. As it is, it may be held that there was sufficient detail in the complaint as a corporation to meet the requirements of Section 21 (1) C.P. Does the complaint, with the facts stated in it, state a cause of action, notwithstanding, of course, that defendant's attack can be made upon the complaint itself, rather than on "specifically" pointing out the defects complained of. We think it does. The Complaint states an action as has to collect a debt predicated on a written agreement. This is the most direct of actions and it is not apparent to us why the information disclosed does not reasonably inform defendant of the nature of plaintiff's claim. If we wanted more details the rules provide for appropriate motions to that end.

Defendant complains that no consideration for the agreement was shown or proved. But the complaint itself, either with the facts pleaded and proved, imports that consideration which flows from the act of one party to another to pursue a right against another. The important words in the agreement are: "I agree to make remittances ** in annual payments as soon as I have employment." In plaintiff's view it initially had a valid, enforceable claim against defendant. I think it did not have to wait the pursuit of this claim until it had found "employment", and then to be satisfied with "partial payment". If it agreed to do so in return for the promise to pay, this is a promise on the part of plaintiff and enforceable as a valuable consideration. In *Ill. v. ...*, 201 Ill. 2d 1, 201 Ill. 2d 1, it is said:

"The promise to enforce or pursue a claim or claim or an agreement to enforce or pursue a claim, either consideration in support of a promise or a promise, provided the claim is enforceable in fact."

The argued absence of proof of delivery and acceptance is answered by the fact that plaintiff, after all, was in possession of the agreement, sued thereon and by defendant's acknowledgment of the correctness of the agreement's recitals and promises. Indeed, the fact defendant would even discuss with plaintiff's agent, the possibilities of payment, the reasons for non-payment, and his employment status, further satisfies proof-wise these symbolic requirements in the law of contracts.

The remaining matters can be disposed of quickly. In regard to the late filing of plaintiff's Reply, it was within the court's province to grant leave to do so, for we can assume a showing of good cause, and it is readily apparent that a blanket denial of the affirmative defenses could not have surprised defendant and placed him in an awkward position for trial that day. Nor was the denial of defendant's motion for a continuance erroneous. The affidavit did not show, as it must, under Supreme Court Rule 14 (1), "of what particular fact or facts" defendant would have testified to if present. Furthermore, defendant had been granted a continuance during the previous month, the cause had again been reached for trial, and it is hard for us to see that any "sufficient excuse" existed for a continuance, as called for in Par. (6) of that Rule. Relative to the failure of plaintiff as a non-resident to file security for costs until after judgment, the short answer is, that security was posted, albeit belatedly. (Sec. 1, Chap. 33, Ill. Rev. Stat. 1955) Contrary to what defendant says, this after-judgment posting was authorized, for the prior absence of security, even though brought to the attention of the court, did not in any way effect its jurisdiction to proceed. Finally, it is true the judgment of \$855.26 exceeds by \$8.75 the amount proved and as set out in the agreement

The argument of proof of delivery and acceptance is answered by the fact that plaintiff, after all, was in possession of the agreement, and that the defendant's acknowledgment of the correctness of the agreement's terms and provisions. Indeed, the fact defendant would even discuss with plaintiff's agent, the possibility of payment, the reason for non-payment, and his cryptographic status, further satisfies proof of delivery. The defendant's position is the law of contract.

The remaining matters can be disposed of quickly. In regard to the late filing of plaintiff's reply, it was within the court's province to grant leave to do so, for we can assume a showing of good cause, and it is readily apparent that a blanket denial of the affirmative defense could not have surprised defendant and placed him in an adverse position for trial that day. Nor was the denial of defendant's motion for a continuance erroneous. The affidavit did not show, as it must, under Supreme Court Rule 14 (1), "of what particular fact or facts" defendant would have testified to if present. Furthermore, defendant had been granted a continuance during the previous month, the court had again been forced for trial, and it is hard for us to see that any "sufficient cause" existed for a continuance, as stated for in Par. (6) of that order. Relative to the failure of plaintiff as a non-resident to file security for costs with this judgment, the court's order is, that security was posted, albeit late. (Sec. 1, Chap. 25, Ill. Rev. Stat. 1907) Contrary to what defendant says, this after-judgment posting was authorized, for the prior absence of security, even though brought to the attention of the court, did not in any way affect its jurisdiction to proceed. Finally, it is true the judgment of 1907, as amended by 1911, was proved and set out in the judgment.

(\$846.51). This happenstance apparently came about because the court instructed the jury, that if they found for plaintiff they should assess damages of \$855.26 (the complaint figure) against defendant, which is exactly what they did. Defendant, however, made no objection to this or any instruction. Nor did he even offer any. No excuse is offered to explain this silence and inaction. Hence he is here in no position to complain. The judgment is accordingly affirmed.

Judgment affirmed.

McNEAL, J. and DOVE, J. concur.

(§ 442.51). This happened apparently about because the court
has ruled the jury, and if they find for plaintiff they should award damages
of \$50,000 (the complaint in fact) against defendant, which is exactly what they
did. Defendant, however, made no objection to this or any instruction. Nor
did he even offer any. His excuse is offered to explain his silence and in-
action. Since he is here in no position to complain. The judgment is ac-
cordingly affirmed.

Judgment affirmed.

McNEAL, J. and HOWE, J. concur.

48218

MILDRED B. THEMAR,

Plaintiff-Appellee,

v.

JOHN DRAIS THEMAR,

Defendant-Appellant.

31 I.A. 39

APPEAL FROM THE
SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The Superior Court allowed the plaintiff \$500.00 for attorney fees for defending two previous appeals by the defendant, John Themar, in this same cause. The defendant appeals from the award and the plaintiff cross-appeals, contending that the fee allowed her attorney was too small.

The parties were divorced and the decree provided that \$4,400.00 be paid to Mrs. Themar. Soon thereafter Themar filed a petition in bankruptcy scheduling his indebtedness to his wife. After his discharge in bankruptcy he discontinued the decretal payments. Mrs. Themar then retained her present attorney and petitioned for a rule to show cause. Themar answered that his discharge relieved him from making further payments. The rule to show cause was entered, but Themar appealed without waiting for the return of the rule. That appeal (No. 47991) was not from a final order and it was dismissed, upon Mrs. Themar's motion, without a written opinion.

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Themar immediately petitioned the divorce court to declare that the money portion of the decree had been discharged and asked that the rule to show cause be quashed. The trial court sustained Mrs. Themar's motion to strike upon the ground that it was without jurisdiction to hear the petition because the mandate of this court had not been issued. Themar, the very same day, appealed from that order. In the second appeal (No. 48079) this court affirmed the trial court. Themar v. Themar, 28 Ill. App. 2d 138, 171 N.E.2d 104.

After receiving notice of the second appeal Mrs. Themar's attorney petitioned for attorney fees stating that, from the time he had been retained until the time he presented the petition for fees, he had spent 75 hours in court appearances and in the preparation of motions, pleadings and briefs. Eighteen exhibits were attached to the petition. He requested \$2,250.00 for his past services and \$1,000.00 temporary fees for the work he would have to do in defending the second appeal. The court's order allowed fees of \$500.00 "for defending appeals numbered 47991 and 48079 arising from the above cause." This third appeal is from that order.



In an effort to avoid compliance with the court's order the defendant attempts to inject into this appeal, as he tried to do in the former ones, the question of whether the balance due on his financial obligation to his wife was discharged in bankruptcy. The question is not at issue, is not in the order appealed from, and will not be considered.

Themar also blames the plaintiff's attorney for his troubles. His brief states: "Counsel for the plaintiff...is responsible for all this litigation. He is not entitled to any fees for litigation which he is responsible for prolonging." The thrust of this specious argument is that the plaintiff's counsel should not have striven to enforce the decree and should not have opposed appeals of dubious merit. Themar's brief goes on: "The defendant, rightly or wrongly, has been pauperized by three separate appeals." While we sympathize with his distress, we must observe that if this unfortunate condition prevails, it does so only because of his own improvidence; the three precipitate appeals were his own.

The defendant also asserts that Mrs. Themar should pay the fees herself because no showing was made that she was unable to do so. There also was

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no showing that she was able to do so or that she should do so. There is nothing in the record to support these diversionary attempts to place the fee obligation upon the plaintiff. Mrs. Themar was compelled to defend two appeals and it was proper for the court to allow her solicitor's fees. Ill. Rev. Stat., ch. 40, para. 16 (1959).

The question is not whether fees should have been allowed, but whether the fees are reasonable. The petition asked for payment for work done prior to the appeals and a temporary fee for the second appeal, but the court's order allowed nothing for the prior work and said nothing about a temporary fee. We believe the plaintiff's attorney is entitled to compensation for prosecuting the rule to show cause and to greater recompense for the two appeals. Although the first appeal was dismissed, the plaintiff's attorney filed counter-suggestions, a motion and a brief in this court. He appeared here twice: once for a conference upon the defendant's petition to reduce the bond and the second time for oral argument upon his own motion to dismiss. The amount of work done and the time consumed were equivalent to that of a completed appeal. All of

this was set forth in his petition for fees and was substantiated by his exhibits.

In arriving at the sum of \$500.00 we presume the chancellor took into consideration the fact that the defendant had been declared a bankrupt. We have likewise considered the bankruptcy, but we have the advantage of having before us, at the defendant's request, his affidavit of income and expenses which was filed during his first appeal in support of his motion for a lower supersedeas bond. In considering all the factors involved, we believe the fee should be increased to \$1,000.00. Bramson v. Bramson, 17 Ill. App. 2d 87, 149 N.E.2d 399. Of this amount \$200.00 should be allocated for services preliminary to the appeals and \$400.00 in full for each appeal.

The order of the Superior Court will be affirmed as to the award of fees and will be reversed as to the amount of those fees; the cause will be remanded with directions to enter an order consistent with this opinion.

Affirmed in part, reversed
in part and cause remanded
with directions.

Schwartz, P.J., and M Cormick, J., concur.

Abstract only.

48199

ERNEST A. EKLUND, Executor of
the Last Will and Testament
of George H. Breinig, Deceased,

Appellant,

v.

CHESTER T. DeJONG, STANDARD
OIL COMPANY OF INDIANA, a
Corporation, and STANDARD
OIL COMPANY OF NEW JERSEY,
a Corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

31 I.A. 40^{2d}

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The action on which this appeal is based was brought by Ernest A. Eklund, executor of the last will and testament of George H. Breinig, deceased (hereinafter referred to as the plaintiff), to determine the ownership of 284 shares of common stock of Standard Oil Company of Indiana, a corporation, and the ownership of any and all stock and cash dividends issued or paid on the shares after December 16, 1953. The cause was referred to a master in chancery who found that no fiduciary relationship existed between Chester T. DeJong (hereinafter referred to as the defendant) and the deceased Breinig, and that the stock certificates in question were the subject of a completed gift to the defendant from Breinig. The master recommended that a decree be entered dismissing plaintiff's complaint for want of equity. Objections and exceptions to these findings were overruled, and the court entered a decree accordingly, from which this appeal is taken.

The plaintiff's theory here is that a fiduciary relationship existed between the defendant and Breinig, and that as a result of this relationship the purported gift was voidable and the burden was upon the defendant to prove that Breinig's intention, if any, to make the gift originated with Breinig free from the defendant's influence, and further that the defendant failed to prove by clear, certain and convincing evidence the essential elements of a gift. The defendant's theory is that the plaintiff failed to prove that a fiduciary relationship existed, and that it was properly proved that the property in question was the subject of a gift made to the defendant by Breinig.

The parties have stipulated as to the stock in question. The 284 shares of common stock in the Standard Oil Company, a corporation of Indiana, was represented by certificates numbered 3158 for 100 shares, 255129 for 100 shares, and 03386 for 84 shares; and it is undisputed that these shares were transferred on the books of the company from George H. Breinig, deceased, to the defendant on December 16, 1953. Breinig died on November 4, 1954. It is also agreed that about December 1, 1954 a stock dividend was issued to the defendant by the Standard Oil Company of Indiana in the amount of 284 additional shares, which are represented by certificates numbered C32891, C32892, and C0209770, all of which shares were registered in the name of defendant, and on September 30, 1954, as an additional stock

dividend, four shares of common stock in the Standard Oil Company of New Jersey were issued to the defendant. It is further stipulated between the parties that the additional dividends to the date of the master's report amounted to \$3,792.54.

The first question to be determined is whether or not a fiduciary relationship existed between Breinig and the defendant.

It is the rule that in a case such as this, where the fiduciary relationship would be one not existing as a matter of law, the burden of proof in the first instance is on the plaintiff to prove the existence of a fiduciary relationship by proof which is so clear, convincing, strong, unequivocal and unmistakable as to lead to but one conclusion. Landau v. Landau, 20 Ill.2d 381, 170 N.E.2d 1; Lux v. Lelija, 14 Ill.2d 540, 152 N.E.2d 853; Kapraun v. Kapraun, 12 Ill.2d 348, 146 N.E.2d 7; Kolze v. Fordtran, 412 Ill. 461, 107 N.E.2d 686; Compton v. Compton, 414 Ill. 149, 111 N.E.2d 109; Maley v. Burns, 6 Ill.2d 11, 126 N.E.2d 695. In case such a relationship is properly established the burden of proof then rests upon the defendant to vindicate the gift by showing it was perfectly fair and reasonable in every respect (White v. Smith, 338 Ill. 23, 26, 169 N.E. 817, 818), or as was said in Gilmore v. Lee, 237 Ill. 402, 411, 86 N.E. 568, 570, that if a gift is made to the person in whom confidence is reposed by reason of the relationship,

it is prima facie void, and the burden of proof rests upon the donee to show it was the free and voluntary act of the donor.

What constitutes a fiduciary relationship has been discussed many times in the decisions handed down in our courts. In Carroll v. Caldwell, 12 Ill.2d 487, 495, 147 N.E.2d 69, 73, the court says:

"It is settled law that courts of equity will not set any bounds to the facts and circumstances out of which a fiduciary relationship may spring. (Fisher v. Burgiel, 382 Ill. 42). The relationship may exist as a matter of law between partners, joint adventurers, trustee and beneficiary, guardian and ward, attorney and client, and principal and agent, (Stone v. Stone, 407 Ill. 66; Ditis v. Ahlvin Construction Co., 408 Ill. 416;) and it may arise as the result of a joint enterprise, (Harmon v. Martin, 395 Ill. 595), or an intimate business association, (Schueler v. Blomstrand, 394 Ill. 600), or it may be moral, social, domestic, or even personal in its origin (Apple v. Apple, 407 Ill. 464). Briefly, as stated in Fisher v. Burgiel, 382 Ill. 42, at 52-53, 'The fiduciary relationship with its legal incidents includes not only all legal and technical relations * * *, but it extends to every possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other.'"

The rule itself is simple. The application of the rule to any given set of facts is difficult. What constitutes a fiduciary relationship when the relationship does not exist as a matter of law depends upon the circumstances of the case.

In the instant case in 1953 George H. Breinig, a man 89 or 90 years old, had lived at the Swedish Baptist Home (hereinafter referred to as the Home) in Chicago since 1948. He had only distant relatives whom the defendant had never

met. His closest relatives were two cousins and a nephew. None of his relatives visited him. Breinig and the defendant had been close friends for over 50 years. They were companions, met socially and engaged in the same sports and other activities. They had worked together in the same company, first in St. Louis beginning in 1900, and then they came to Chicago together and worked for the same company until Breinig retired. Breinig entered the Home and the defendant continued seeing him there.

There is testimony in the record, and the master finds, that during the last few years of the testator's life he suffered from increasing physical weakness. He was physically unsteady and showed other signs of physical weakness, which increased until his death on November 4, 1954. During 1953, besides the defendant, Breinig had other visitors. During most of his lifetime, including 1953 and 1954, Breinig was dealing in the stock market, and at the time of his death he left 5,548 shares of stock in 19 different companies and \$23,000 in accounts at banks. Breinig had two safe deposit boxes, one in the Northern Trust Company and the other in Columbus Safe Deposit Vaults. The defendant was appointed a deputy on the Columbus safe deposit box on March 2, 1953. Breinig removed him as a deputy on April 13, 1953. The defendant gave some assistance to Breinig on his income tax returns for 1949, 1950 and 1951, and the defendant was asked by Breinig to make out the 1952 tax return or get assistance. The



defendant had a Mr. Wahl, a stock broker, make out the return and the defendant signed Breinig's name and his own as attorney in fact. He did not have any written power of attorney from Breinig. The defendant never purchased nor sold any stock for Breinig, nor did he take care of transferring stock certificates. He made no withdrawals from the bank for Breinig, nor did he assist Breinig during his lifetime in any business transactions excepting what assistance he gave him in regard to the income taxes. The defendant checked the bank statements at the request of Breinig.

The defendant testified that in August or September of 1953 Breinig gave him the stock certificates for the 284 shares of the Standard Oil Company of Indiana which are in question. He gave them to him in Breinig's room at the Home in August or September of 1953. In the plaintiff's brief it is stated that DeJong testified that "Breinig removed them from a suitcase in his room at the Swedish Baptist Home for the Aged and handed them to DeJong." The defendant had never seen them before. Breinig signed an assignment of the stock certificates separate from the certificates, dated December 14, 1953, but he did not endorse the certificates. On December 14, 1953 the defendant took the stock certificates to Wahl, and Wahl testified, without objection, that he called Breinig and was told by him that he wanted the certificates of stock transferred to the defendant and that he had signed the assignment

and that it was all right for Wahl to go ahead and transfer them. Wahl further testified that the assignment was in blank at the time it was brought in with Breinig's signature on it; that he (Wahl) filled in the name of defendant and the number of shares, the name of the company, together with the number of the certificates and the date; that he signed as a witness and had a Mr. Stone, employed by the brokerage company, guarantee Breinig's signature and certify that the person's name appearing on the face of the certificate and the assignment was one and the same person. Stone did this on Wahl's assurance after Wahl's telephone conversation with Breinig. Wahl thereupon had the certificates transferred on the books of the company to the defendant. There is evidence in the record that while at the time of the transfer the defendant had physical disabilities resulting from age, he was up and around, walking about the Home, and periodically he came down to the office of the Home. Up to March of 1953 he took walks outside. A nurse at the Home testified that she could not form an opinion as to whether Breinig's mind was so affected that he could not transact business in December 1953. She also testified that Breinig kept a suitcase in his room where he put his bank statements, that she knew nothing about what was in the suitcase, and that she was not present at the time when he transacted any business.

On March 8, 1954 Breinig executed his last will

and testament. The will was prepared by the plaintiff and disposed of an estate valued at over \$123,000 to four specific beneficiaries and twenty residuary legatees. In the will nothing was left to the defendant. Mrs. Berg, who was office secretary and bookkeeper for the Home, was a witness to the will, and she testified that at the time she witnessed the will it was her opinion that Breinig was of sound mind and memory, that he was able to transact business, and that his mind was perfectly clear and he knew what he was doing. She testified that at that time she saw him every day in the Home and he would walk up and down the corridors and stop in the office. The attorney representing the plaintiff in this suit was also a witness to the will. He testified that the will was signed in the office of the Home, that at that time he was of the opinion that Breinig was of sound and disposing mind and memory, and that he so testified in the Probate Court. From the record it appears that the same attorney, at Breinig's request, prepared his income tax return for the year 1953 and that he (the attorney) signed it.

There is also evidence in the record that Breinig on occasion gave the defendant small amounts of money—nothing over \$50.00. A check for \$1,000 was presented in evidence, signed by Breinig, payable to the defendant and endorsed by the defendant. The defendant stated that he had apparently received the \$1,000 but he did not know what it was for. There is no evidence in the record that the defendant during

the period that he was designated as deputy of Breinig had entered the Columbus safe deposit box.

In Landau v. Landau, supra, the court says:

"While this court has from time to time set out factors and circumstances to be considered in ascertaining whether a fiduciary relationship in fact exists, we have consistently refused to set their precise boundaries. The underlying equitable test of the existence of such a relationship in a constructive trust case is the repose of special confidence and trust on one side and domination and influence on the other. (Mors. v. Peterson, 261 Ill. 532; Seely v. Rowe, 370 Ill. 336; Dyblie v. Dyblie, 389 Ill. 326; Moneta v. Hoinacki, 394 Ill. 47; Maley v. Burns, 6 Ill.2d 11.)"

The plaintiff contends that there was a fiduciary relationship between Breinig and the defendant as a matter of law. He bases that contention upon the fact that Breinig appointed the defendant a deputy with the right to enter his Columbus safe deposit box from March 2, 1953 to April 13, 1953, and that the defendant had had something to do with Breinig's income tax returns for 1949, 1950 and 1951, as well as the fact that Breinig had asked the defendant to make out his 1952 income tax return or get assistance and had orally authorized him to sign Breinig's name as his attorney in fact. In Latimer v. Perry, 410 Ill. 119, 128, 101 N.E.2d 531, 535, the court says:

"We have held that the relationship between principal and agent is a fiduciary relation. (Rieger v. Brandt, 329 Ill. 21.) However, we have stated that the agent is a fiduciary only with respect to matters within the scope of the agency. (Hickey v. Hickey, 371 Ill. 476.)"

The gift of the stock certificates was made in August

or September of 1953. There is no evidence in the record that at that time the defendant was an agent of Breinig in any respect whatsoever.

From the evidence it is apparent that no fiduciary relationship, as a matter of law, existed between defendant and Breinig. The plaintiff, however, contends that the evidence establishes the existence of a fiduciary relationship in fact, and he bases his conclusion on the age of Breinig and his mental and physical condition, the long friendship which had existed between them, together with the fact that the defendant had assisted Breinig with his income tax matters, that he checked his bank account, and that for a short period of time had been authorized to enter into Breinig's safe deposit box.

The existence of friendship does not of itself show the existence of a fiduciary relationship. Rubin v. Midlinsky, 321 Ill. 436, 440, 152 N.E. 217, 219; White v. Smith, supra; Guffey v. Washburn, 382 Ill. 376, 381, 46 N.E.2d 971, 973. Nor does assistance in business affairs establish such relationship. In re Cottrell's Estate, 235 Mich. 627, 209 N. W. 842; White v. Smith, supra.

The plaintiff contends that the mental and physical condition of Breinig is a factor which is of great weight in determining whether or not a fiduciary relationship existed. In Sears v. Vaughan, 230 Ill. 572, 586, 82

N.E.881, 886, the court says:

"Mere impairment of memory, by reason of advanced years, does not, of itself, indicate a want of power to comprehend a transaction and to dispose of property.
* * * [Cases cited] "

When we consider as a whole the evidence concerning the mental and physical condition of Breinig, the long friendship between Breinig and the defendant, the assistance that the defendant rendered Breinig with reference to his income tax returns, and the authorization of the defendant for a short period to enter Breinig's safe deposit box, it cannot be said that the evidence is so clear, convincing and unmistakable as to lead to a single conclusion—that a fiduciary relationship existed between the defendant and Breinig. The master could, and did, find that no fiduciary relationship was in existence at the time the certificates of stock were given to the defendant by Breinig.

The evidence in the record is amply sufficient to prove a gift from Breinig to the defendant. The stock certificates were delivered by Breinig to the defendant at the Home during August or September of 1953. The defendant had never previously seen the certificates. Breinig gave him a signed stock power form. There is no dispute that this form contained the genuine signature of the testator. The employee of the brokerage house who filled out the form testified that he had called Breinig on the telephone, and that Breinig then verified his signature and verified the fact that he wished the

certificates to be transferred to defendant. While no issue was properly raised in the pleadings with reference to the incompetency of Breinig at the time to transact business, the question is argued in the briefs, and the plaintiff relies upon a statement on the face of the 1952 income tax return that Breinig was because of age and illness incapable of going to his safe deposit box and that he was so old that he could not remember what securities he had. Wahl testified that he made out the 1952 income tax return at the defendant's request, that he prepared it under his instructions, and that the information concerning the dividends and interest and the amounts relative thereto was given to him by the defendant. The statement on the tax return was not in the handwriting of the defendant, although the defendant signed Breinig's name to the return as attorney in fact. However, we find evidence in the record that in 1954 the present attorney for the plaintiff made out an income tax return for Breinig and he does not indicate that he (the attorney) had any difficulty in getting the requisite information from Breinig. In Sears v. Vaughan, supra, the court says: "In order to justify a court of equity in setting aside a deed or contract on the ground of mental incapacity, it must appear that the grantor did not have sufficient mind and memory to comprehend the nature and character of the transaction in which he was engaged." In Kolze v. Fordtran, supra, at page 469, the

court says: "Impairment of mind incident to old age and disease or eccentricities will not render the conveyance invalid so long as the grantor is able to comprehend the nature of the transaction and protect his own interests."

See Kelley v. Kelley, 168 Ill. 501, 48 N.E. 158, and McGlaughlin v. Pickerel, 381 Ill. 574, 46 N.E.2d 363.

There also is evidence in the record that at the time the testator signed the will he was of sound and disposing mind and memory, that his mind was perfectly clear and that he was able to transact business. The plaintiff argues that this evidence cannot be used to prove that Breinig had the ability to "transact ordinary business in August, September or December of 1953" inasmuch as it has been held that a higher degree of mental capacity is required to make a valid deed than to execute a will, citing Mount v. Dusing, 414 Ill. 361, 111 N.E.2d 502. However, in this case Breinig was not making out a deed. He was making a gift of certain property to the defendant. In Jones v. Thomas, 218 Mo. 508, 117 S.W. 1177, the court, after referring to this rule, states that in that case the deeds were not for the exchange of value within the ordinary meaning of conveyances of real estate but were intended as gifts of the land in consideration of love and affection, and that there was no more mental capacity required in that case than in the case of making out a will. In Kolze v. Fordtran, supra, at page 470, the court says:

"No greater mental capacity is required to make a deed of voluntary settlement reserving a life estate than is required to make a will. (Johnson v. Lane, 369 Ill. 135; McGlaughlin v. Pickerel, 381 Ill. 574.)"

Breinig, it appears, was a man with a high degree of business ability. The amount of his estate and the fact that he engaged in stock transactions almost up to the time of his death render that conclusion inevitable. There is nothing in the record from which it could be found that he lacked the capacity to transact business, much less that he lacked that limited degree of capacity which the cases indicate is required to substantiate a gift.

The plaintiff also relies upon a letter introduced in evidence written by the defendant to Mrs. Berg, the secretary of the Home, in which he makes some reference to an enclosed paper and requests the typing of the defendant's name under "Name of Deputy." The master finds, reasonably, that since on March 2, 1953 Breining had made the defendant his deputy to enter the Columbus safe deposit box the letter may have some connection with it. The defendant testified that he could not recall the circumstances surrounding the writing of the letter. The letter also states that the defendant had tried to get Breining to give the nurses an Easter gift, which he refused to do. This portion of the letter would seem to indicate that Breinig was not under the domination and control of the



-15-

defendant.

The necessary elements of a gift were proved by the defendant, i.e., that there was an intention of the part of Breinig to transfer the title and right of possession of the stock certificates to the defendant, and that there was delivery of the subject matter of the gift by which he parted with all control over it. Rothwell v. Taylor, 303 Ill. 226, 232, 135 N.E. 419, 421. Since there was no fiduciary relationship existing, no presumption of undue influence arose, and consequently no additional burden is shifted to the defendant with reference to the fairness of the gift. We find that the defendant had the necessary mental capacity to transact business and there is no evidence in the record to indicate that at the time the gift was made Breinig did not understand the nature and effect of the transaction. Nor is there any evidence in the record which would justify a finding that the stock was obtained by the defendant from Breinig by the exercise of undue influence over him.

The judgment of the Superior Court is affirmed.

Affirmed.

Schwartz, P.J., and Dempsey, J., concur.

Abstract only.

48094

MILTON N. PREDOVICH,

Plaintiff-Appellee,

v.

THE NEW YORK CENTRAL RAILROAD
COMPANY, a corporation,

Defendant-Appellant.)

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

31 I.A. 2d 39

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

In this FELA case the jury awarded plaintiff \$150,000 damages and defendant has appealed from the judgment on the verdict.

Plaintiff, then 33 years old, was injured on June 6, 1957 when he fell while carrying a basket of linen away from a dining car. He was at the time employed by defendant, New York Central, in the loading of supplies onto, and the removal of empty bottles, linen and the like from, the car. When he fell he was walking between tracks in the Illinois Central yards in Chicago.

Plaintiff alleged defendants had the duty to use reasonable care to furnish him a reasonably safe place to work; the violation of that duty in its negligent maintenance of his work area; and his injury proximately caused by the neglect. Issue was joined on these charges and defendant alleged that plaintiff's negligence was the sole cause of his injury.

The trial court denied defendant's motions for directed verdict and for judgment notwithstanding the verdict. Defendant claims this was error since there was no evidence of its negligence causing the injury.

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This court is bound by the rule established by the Supreme Court of the United States for measuring the sufficiency of evidence in FELA cases. Bowman v. Illinois Cent. R.R., 11 Ill. 2d 186, 201, cert. denied, 355 U.S. 837 (1957). The Illinois Supreme Court in Finley v. New York Cent. R.R., 19 Ill. 2d 428, 433 (1960), states this rule as follows: "The sole question is whether there is any evidence, considered in the light most favorable to the plaintiff, that defendant was guilty of negligence which contributed in whole or in part to plaintiff's injury." The Supreme Court states the rule differently but the substance is the same. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506-07, rehearing denied, 353 U.S. 943 (1957); Wergin v. Monessen S.W. Ry., 258 F.2d 806 (1958).

Defendant had the duty to furnish plaintiff a reasonably safe place to work. McCray v. Illinois Cent. R.R., 12 Ill. App. 2d 425, 433 (1957). The question is, therefore, whether there is any evidence that plaintiff's work area was not a safe place to work and that his injury was proximately caused in whole or in part in violation of its duty. If there is, the court properly submitted the question to the jury.

In deciding this question we have disregarded the unfavorable testimony of plaintiff's conversation with his superior on the way to the hospital. And we do not consider the unfavorable evidence on which defendant argues in its reply brief.

The favorable testimony for plaintiff follows. He had stocked the dining car and had begun to carry away from the car a linen basket 4 feet long, 3 feet wide, 36 inches deep, weighing 25 pounds. The roadway between the tracks, at which cars

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are prepared, was littered with brake shoes, hoses, fusees, bottles, junk, garbage, scrap paper and corks. There were holes, "crevices" in the cinders and asphalt roadway, and water in the holes and mud. Plaintiff, while walking with the basket, slipped "on something," fell and was injured. Plaintiff noticed the condition of the roadway after he fell and his left side was "a bit wet." There was testimony that complaints about the yard had been made to "the fellows at Root Street and lots of times we got stuck there with the tractor . . . and had to have it pulled out from the holes" There had been no repair work whatever done in the roadway between the tracks "in the last seven years." We think the evidence we have recited was sufficient to take this case to the jury on the question of the railroad's negligence in maintaining the roadway and the proximate cause of plaintiff's injury.

Common experience reminds us that carrying, upon ground of uncertain footing, a linen basket of the weight and size of the one plaintiff's duties required him to carry is a hazardous undertaking. Hazards of walking where the footing is uncertain is implicit. Onderisin v. Elgin, J. & E. Ry., 20 Ill. App. 2d 73 (1959); McCray v. Illinois Cent. R.R., 12 Ill. App. 2d 425 (1957).

We see no merit in the railroad's contention that plaintiff should have specified what he slipped on. See Lavender v. Kurn, 327 U.S. 645 (1946). The burden of producing "any evidence" may be met by proof "entirely circumstantial." Rogers v. Missouri Pac. R.R., 352 U.S. 500, 503 (1957). That plaintiff might have tripped on bottles does not militate against the validity of an inference that he slipped on "something" else

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in the roadway. Finley v. New York Cent. R.R., 19 Ill. 2d 428, 436 (1960). The favorable inference from the testimony is that in carrying the basket he was unable to tell what it was that he slipped on. The testimony that he could see where he was walking is not, here, pertinent. These considerations are sufficient upon which to distinguish Wergin v. Monessen S.W. Ry., 258 F.2d 806 (1958) and Baum v. Baltimore & O. R.R., 256 F.2d 753, cert. denied, 358 U.S. 881 (1958).

We conclude on this phase of the case that the trial court did not err in refusing to direct a verdict for defendant or to enter judgment in its favor notwithstanding the verdict.

There remain on this liability issue claims of errors which bear on that issue. With respect to the opinion asked the lay witness whether the roadway was a safe place to work: this was error for which judgment was reversed in Keefe v. Armour & Co., 258 Ill. 28 (1913), but is not reversible error here because the record leaves room for a "clear inference" for the jury. Wawryszyn v. Illinois Cent. R.R., 10 Ill. App. 2d 394, 405 (1956). There was no error in admitting plaintiff's photograph of the work area in light of defendant's photograph from a different viewpoint. The law was misstated to the jury in argument by plaintiff's counsel, but the point was disputed and left undecided. No serious error was involved. The instructions bearing on liability were not objected to in the instruction conference and cannot be raised now. Onderisin v. Elgin, J. & E. Ry., 20 Ill. App. 2d 73, 77 (1959). We find no merit, therefore, in the contention that, on the

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question of liability, defendant was prejudiced by errors at the trial.

We turn now to the issue of damages. The jury's verdict equalled the ad damnum of \$150,000 in the complaint. Defendant contends that the award is excessive and that the judgment must be reversed for a retrial or a substantial remittitur be ordered. The basis of the contention is the claim of an unfair trial because of prejudicial rulings and conduct at the trial.

Plaintiff was first employed by defendant in 1942. He entered the army in 1943 and in September of 1945, suffered bullet wounds in the head and chest. A "tantalum plate . . . about the size of a quarter" was put into his left upper forehead in February 1946. After this he had "black-outs" and if "standing up he would fall to the ground." He was re-employed by defendant the following August, and worked until 1952 when he entered Hines Hospital for removal of a chest cyst. Following this operation he took leaves of absence for about four and one-half years. In that period he was "quite run down," having lost about fifty pounds following surgery, and he was weak and nervous. He "just laid around, rested and convalesced" in that interval. His last black-out was in 1954 but up to the time of the trial he was receiving sedative medicine once a month at Hines Hospital to prevent black-outs. He returned to work in March of 1957 and his fall and injury occurred on June 7, 1957.

After plaintiff's fall in June of 1957 his right arm was put in a long cast for about five weeks, and in a smaller cast

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for five more weeks. He then received whirlpool and therapy treatments including manipulation of the right hand. When the hand was manipulated he suffered pain "up to the shoulder." He testified that in this period he began to "get the tic in his head." The tic goes "steadily" if he uses the hand "much over half an hour." He said he never had a tic in the right arm or shoulder before his fall.

There was no substantial dispute about plaintiff's condition at the time of trial. His fall broke both bones of the right wrist. His right arm is smaller than the left. His wrist has a deformity in a position of flexion. There is atrophy of the muscles and tendons and the skin over the break "shiny and weak." There is a 30% limitation in the flexibility of the fingers of the right hand and a limitation on turning the palm up; a displaced fragment of the prominent bone on the small finger side, a decalcification of the hand, wrist and forearm which softens the bone of the fingers of the right hand and an inability to make a normal fist or to straighten the fingers. ~~out.~~ There is an involuntary twitching of the head.

Defendant complains that there was error in the trial court's refusal to give instructions D-11 and D-14 on damages. We think D-11 was substantially covered in P-11. And D-14 was properly refused because it might have misled the jury with respect to the compensation of prior injuries of the defendant, since plaintiff might have had prior injuries aggravated by the occurrence and for which aggravated condition compensation would be proper. See ILLINOIS PATTERN

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JURY INSTRUCTIONS, IPI NO. 30.03 (1961) and the notes thereunder.

We think the judgment must be reversed however because the court committed serious error in excluding from evidence and the jury room two exhibits offered by defendant. These exhibits were medical examination forms on which the examiners had written, what they said were, plaintiff's answers to questions of his prior health and injuries. The exhibits bore on the main question on the damage issue, whether plaintiff's condition at the trial was proximately caused by the fall in the railroad yard or by the previous brain injury suffered while in the army. To the question about prior injuries, the answer in neither exhibit refers to the military injury to plaintiff's brain. The excluded exhibits in our opinion were relevant, competent, and under the circumstances, necessary evidence.

The issue of the plate in plaintiff's head was an essential element in consideration of damages. We think that, if plaintiff's condition at the trial was not, aside from the fractures, substantially due to his fall in the railroad yard, the verdict is excessive. There was conflicting testimony, lay and expert, on the question of the cause of that condition. It was necessary that on this issue the jury be properly and fully informed.

When the exhibits were offered in evidence plaintiff's attorney said, in the presence of the jury, "I'll let it go in, if it helps the jury." No ruling was made on the offer. Both attorneys, presumably under the impression that they were admitted, argued about the exhibits to the jury. After

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argument the defense attorney stated that it "was intended, if it did not move for admission of these . . . in evidence, request that these . . . go to the jury room." Plaintiff's attorney objected and the court sustained the objection on the ground that the "salient parts" had been given to the jury.

It is true that the question and answer on the exhibits were covered in the testimony of the examining doctors. However, plaintiff's attorney in cross-examining the doctor who made the examination in 1957 asked repeated questions attempting to elicit the answer that the "war wound" mentioned in plaintiff's "answer" to the question of previous injuries was the bullet wound in his head. Further questions also induced answers which could have suggested that this doctor was careless or incompetent because he certified plaintiff for re-employment with a plate in his head. This suggestion was emphasized in plaintiff's attorney's argument to the jury. That argument also repeated the suggestion, implied in cross-examination, that the "war wound" referred to the head wound.

We think the cross-examiner's questions about the "war wound" prevented the direct testimony about the exhibits from informing the jury accurately about the contents, and that the total effect was not clear enough for the jury to properly evaluate or interpret the exhibits. In fairly similar circumstances the court in Pittsburgh, C.C. & St. L. Ry. v. Story, 104 Ill. App. 132 (1902), held the refusal to admit an exhibit was reversible error. We think fairness required that the instant jury see the exhibits about which plaintiff's attorney questioned and argued as he did, so that they might learn the basis of

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defendant's theory of damage. Id. at 140. Not having seen them or heard the exhibits read before they retired for deliberation they should have been permitted to take them to the jury room. See ILL. REV. STAT. ch 110, § 67(4) (1959). Because of the examination about the exhibits and references to them in argument, the jury may have concluded that since they were offered in evidence before the jury and then kept from the jury, by a ruling in their presence, that the contents were unimportant on the issue or unfavorable to defendant.

The exhibits were offered to show that plaintiff had withheld vital information about his condition from the medical examiners. The important question at the trial was not whether defendant would or would not have employed plaintiff in 1946 or re-employed him in 1957, nor whether he had the plate in his head at the time. That he did have is not disputed. For defendant's theory it was important for the jury to know that the plaintiff had withheld this information. On that information the jury might wonder if plaintiff's failure to disclose was because he himself thought his condition was serious enough to be hidden and whether or not injuries attributed, at the trial, to his fall, preceded his fall.

There was another error committed at the trial which tended to prejudice defendant. Defendant's attorney objected to a reference to plaintiff "lying in a hospital with a bullet wound in his head" in Germany. The objection was overruled. Even though plaintiff's bullet wound in the brain was referred to by defendant's attorney in opening argument, the trial court

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should have guarded against references to plaintiff's unfortunate military injury. The vital issue on damages revolved about that injury and care was necessary to prevent sympathy of jurors for a wounded soldier from interfering with a fair trial.

The liability question is settled in plaintiff's favor. We are of the opinion, however, that the damage issue alone should be retried because of the errors in keeping the exhibits from going to the jury. In the retrial of this issue the trial court should take care to prevent the climate of the trial from being inflamed by repeated and unnecessary references to, and comments upon, plaintiff's military injury.

We think we have passed on all points necessary for our decision.

For the reasons given, judgment is reversed and the cause is remanded for retrial of the issue of damages.

REVERSED AND REMANDED FOR RETRIAL
OF THE ISSUE OF DAMAGES.

BURMAN AND MURPHY, J.J. CONCUR
PUBLISH ABSTRACT ONLY.

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APPEAL FROM

SUPERIOR COURT,

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31 I.A.^{2d} 70

Appellee and Cross-Appellant.

31 I.A.^{2d} 70

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31 I.A.^{2d} 70

Based on the report of the master, the court found that defendant's current annual income was a salary of \$16,800; that the parties jointly own a 50-acre residential farm, on which they had expended \$125,000 for improvements, furnishings and farm equipment; and that debts chargeable to both parties, including a \$15,000 mortgage on the farm, amounted to \$52,506.90.

The custody of their five minor children was given to plaintiff, subject to defendant's rights of visitation. She was awarded the household furniture and a 1959 Buick station wagon. The farm and its equipment were ordered sold, the proceeds to be used for the payment of the \$52,506.90 debts, and any balance to be divided equally between the parties.

Defendant was ordered to assign to plaintiff all insurance contracts and pay the premiums during the minority of the children; to pay \$100 per week for the support of the children, \$25 a week for domestic help, medical expenses for the children up to \$50 a month, and \$75 per week as permanent alimony; and to pay plaintiff's attorneys' fees of \$4500, the court costs and master's fees. Plaintiff appealed from that part of the decree which determines property rights, alimony and support payments. Defendant cross-appealed from the \$4500 fee allowance.

Plaintiff contends that the order to sell the real estate and to use the proceeds to pay the debts of \$52,506.90 is in effect "to transfer plaintiff's interest in the property to defendant," because with the exception of the jointly signed mortgage, the debts represent family expenses and large personal debts of defendant, for which he alone is responsible and for which her share of the proceeds is not liable. Ch. 68, §§5 and 52, Ill. Rev. Stat. 1957. She also contends that to justify such a transfer of her interest under the Divorce Act, special circumstances and equities must be alleged and established by the evidence. Ch. 40, ¶18, §17, Ill. Rev. Stat. 1957; Skoronski v. Skoronski (1946), 395 Ill. 301; Stevens v. Stevens (1958), 14 Ill. 2d 99.

The Supreme Court, in its opinion transferring the cause to this court, said (at p. 224):

"The only issue having any relation to the real property is the extent to which the parties are entitled to share in the proceeds of its sale. A determination of this issue does not rest upon an adjudication of title, or upon the resolution of a dispute as to title, but solely upon the complementary question of whether the chancellor was correct in his finding that certain debts incurred by defendant inured to the benefit of both parties and thus, in equity, were chargeable against the interests of both in the proceeds of sale."

This being so, our principal question is to determine what debts included in the \$52,506.90 are chargeable against the interests of both in the proceeds of the sale.

Plaintiff cites authorities construing the Family Expense Act to show that the term "family expenses" is not synonymous with "necessaries," which are personal, nor does it include "business expenses which are incurred to secure the means to maintain the family." (Berman & Co., Inc. v. Dahlberg (1948), 336 Ill. App. 233; Hyman v. Harding (1896), 162 Ill. 357; Staver Carriage Co. v. Beaudry (1907), 138 Ill. App. 147.) We do not consider these authorities are controlling or persuasive here.

The plaintiff in her divorce complaint requested "that the court adjust and adjudicate the property rights of the parties herein." The power to effect a fair adjustment of the property rights of the parties in a divorce action has been recognized "wherever special circumstances exist justifying such a decree." (Meighen v. Meighen (1923), 307 Ill. 306; Chmiel v. Chmiel (1948), 399 Ill. 91.) We believe the instant case presented an unusual situation and circumstances calling for the exercise of the power to adjust the property rights, and this included the determination of the disposition of the proceeds of the sale of the jointly owned real estate and the power to order the use of the proceeds for the payment of existing indebtednesses incurred by defendant, which inured to the mutual benefit of both parties and their children.

The record shows that the greatest portion of the \$125,000 invested in the farm came from defendant's earnings. Expert testimony indicated the current market value to range from \$70,000 to \$102,500. Except for 1688-1/2 shares of Delicate Corporation, asserted by defendant to be worthless, the record indicates defendant has no assets beyond his share of the proceeds of the real estate.

After deducting the balance of the mortgage, \$14,908.14, which plaintiff concedes to be a proper item, and the balance due on the station wagon, \$3,783.92, which defendant is specifically directed to pay, the remainder of the debts represents business and bank loans of \$31,282 and family expenses and personal property taxes of \$2,532.84. Although plaintiff charges defendant with being "singularly adept at accumulating large personal debts," and that he was "directly responsible for the existing indebtedness by reason of his dominant methods of definite financing," the chancellor did find that the parties "are in debt in the amount of more than \$52,000 by reason of mortgages, personal debts, loans and personal expenditures, and by reason of a desire of said parties to live beyond their means."

An examination of the record shows extensive testimony was taken as to the earning of the parties, family expenditures, assets of defendant, and their way of living. We do not believe

a detailed itemization of the evidence will serve any purpose here, considering the situation as a whole.

From our examination of the record, we are unable to say that the findings are against the manifest weight of the evidence, or that there has been palpable error committed. The evidence is conflicting, but it has been repeatedly held that the decree of the lower court will not be disturbed unless palpable error has been committed, or unless the decree is against the manifest weight of the evidence. (Chmiel v. Chmiel, 399 Ill. 91, 95.) Therefore, as we believe the chancellor was within his power to "adjudge and adjudicate the property rights of the parties," including ordering the payment of their debts out of the proceeds of the sale of real estate, we conclude that the chancellor did not err in determining the property rights of the parties.

In the award of alimony and child support, the court used for a basis defendant's monthly net salary of \$1,170. Plaintiff contends that to this basis should be added defendant's \$400 a month expense account, because "he is required to make no accounting whatsoever for the use of the money, and is therefore free to apply it to his personal use." Plaintiff cites as a precedent for taking this item into consideration in determining alimony, Schultz v. Schultz (1940), 307 Ill. App. 378. We do not believe this case is in point. We are not

persuaded that the instant situation is such as to warrant adding a business expense account allowance to defendant's income for the determination of alimony. The defendant contends that, as he was ordered to pay a total of \$1,116.33 monthly out of a net monthly income of \$1,170, the addition of the expense account, if proper, would not warrant an increase. We find no reason to disturb this part of the decree or to increase these allowances.

Plaintiff also contends that in view of defendant's "extravagant, vain tastes, his proficiency in contracting substantial debts, his volatile business fortunes and habits, and his irrational monetary whims and fancies," he ought to give reasonable security for the alimony and support payments. While it may be true that plaintiff has no funds of her own, and her financial prospects are unquestionably precarious, the record indicates that defendant will have very little left out of his share of the sale proceeds. He is directed to pay \$4500 attorneys' fees, court costs and expenses of \$626.51, master's fees of \$1,105, the remaining payments due on the 1959 Buick station wagon, indicated to be \$3,783.92, and life insurance premiums. We find no abuse of the chancellor's use of his discretion in refusing to "transfer to plaintiff in trust or under mortgage" defendant's undivided one-half interest in the real estate as security for the future alimony and child support payments.

Defendant has cross-appealed from that part of the decree which orders defendant to pay \$4500 as fees to plaintiff's attorneys, contending that the allowance is excessive and should be substantially reduced. He contends much of the time put in by plaintiff's counsel was induced by himself and unnecessary, and that approximately 20% of the time was put in by juniors performing ministerial acts. The record shows testimony as to time expended by senior counsel and junior counsel, with a summarization of their activities. While the master did indicate to counsel for defendant that he did not care to hear further evidence with respect to fees, we do not believe counsel was arbitrarily dealt with. The award was based on a finding that 100 hours were spent in the preparation of the trial, of which 75 hours were by a senior partner. This was a vigorously contested matter and did involve property interests valued in excess of \$125,000. Plaintiff has no estate with which to pay fees, except whatever may be allocated to her out of the proceeds of the real estate sale. Considering defendant's income, the estate of plaintiff, the extended bitter litigation and all the circumstances of this case, we believe there is sufficient in this record to justify the \$4500 allowance of attorneys' fees. We find here no abuse of the discretion of the chancellor. Barton v. Barton (1944), 323 Ill. App. 357.

For the reasons given, the parts of the decree appealed and cross-appealed from are affirmed, and the cause is remanded for further proceedings consistent with the views expressed herein.

AFFIRMED AND CAUSE REMANDED WITH DIRECTIONS.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.

A

COLUMBUS TAYLOR,)	
	Plaintiff-Appellant,)
	vs.)
) APPEAL FROM THE
) SUPERIOR COURT OF
) COOK COUNTY, ILLINOIS
OLLIE BROWN,)	
	Defendant-Appellee.)

31 I.A. 21

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Columbus Taylor contracted to buy an apartment building from Mrs. Ollie Brown. After Brown declared the contract forfeited for certain alleged breaches, Taylor brought suit in Superior Court asking that the forfeiture be set aside and the contract enforced, and requesting an accounting and a declaratory judgment for a balance claimed due him under the contract. Brown disputed Taylor's claim, and counterclaimed for an accounting and a decree for sums due her under the contract or, in the alternative, for a forfeiture of the contract for non-compliance with its terms. A decree was entered finding that the contract was forfeited, giving possession to defendant, and a judgment for \$22,823.11 plus \$1,233.90 for Master's fees and court reporter's costs, totalling \$24,057.01, was entered against plaintiff in accordance with the Master's recommendation, from which decree plaintiff appeals. Plaintiff first appealed to the Illinois Supreme Court on the theory that a freehold was involved. That court transferred the case to us.

Columbus Taylor first met Ollie Brown in 1941, when he was her tenant. In 1948, Brown purchased the premises at 3750 South Michigan Avenue, which consisted of seventeen apartments. Brown then leased the premises to Farrell Strobe for a term of five years to terminate on December 1st, 1954. On July 31, 1953, Brown entered into an agreement

with Strode for the cancellation of his lease upon the payment of \$5,000.00 to Strode, which sum was to be paid in the following manner: \$3,000.00 in cash and the balance of \$2,000.00 in monthly installments of \$50.00 with interest, to be evidenced by a note and secured by a chattel mortgage of all the personal property in the building.

Simultaneously with the aforementioned arrangement Brown leased the premises to Taylor for a period of five years. This lease recited that Taylor deposited with Brown the sum of \$5,000.00 as security on the lease, but it is clear from the record that full payment of the deposit was not made at the time the lease was executed. Both parties agree that Taylor paid \$3,000.00 in cash, which sum was turned over by Brown to Strode. Brown testified that Taylor purchased the furniture left in the premises by Strode for the sum of \$2,000.00, payable in monthly installments of \$50.00. Then she in turn signed a note for the sum of \$2,000.00 and gave a chattel mortgage on the furniture to Strode for security. Strode verified the transaction as related by Brown. Taylor testified that the apartments were unfurnished and that the payment of \$2,000.00 which he made to Brown in monthly payments of \$50.00 was not for furniture but for the balance of the \$5,000.00 deposit required by the lease.

Articles of agreement for warranty deed were signed by Brown and Taylor on December 1, 1956, and the aforementioned lease was cancelled. This agreement provided in part that if the buyer performed the agreement he would be entitled to a deed; that buyer agreed to purchase the premises for \$33,500.00, with \$7500.00 payable upon execution

and the balance of \$26,000.00 due in payments of \$250.00 monthly, until March 1st, 1957, and then \$450.00 monthly until entire sum was paid; that buyer was to pay general real estate taxes for 1956 and subsequent years; that buyer was to keep the building insured against loss by fire and tornado in an amount equal to the unpaid balance and in addition the buyer was to keep liability (HLT) insurance in force in the amounts of \$50,000.00 and \$100,000.00; that if buyer failed to pay taxes and insurance the seller could pay the same and that said payments when made were to be added to the unpaid balance of the purchase price; that if buyer failed to make any payment or failed to perform any specified agreement and such default continued for thirty days, the seller at his option might elect to forfeit the contract and retain all sums paid in full satisfaction and as liquidated damages, and if the default continued for thirty days after written notice of this election, the contract would be forfeited and determined without further notice; that buyer was to pay all costs and expenses, including attorney's fees, incurred by reason of enforcing any of the provisions of the agreement.

In accordance with the contract terms, Brown sent Taylor a notice dated July 19, 1958, specifying certain failures to comply with the terms of the contract and declaring the contract forfeited if Taylor did not comply within thirty days. The notice stated that Taylor failed to make the down payment, did not keep the required insurance in effect, did not pay the taxes for 1954 through 1956, did not keep the premises in good condition and repair, and allowed a

mechanic's lien to be placed on the premises contrary to the contract.

The Master's Report and the Decree rendered in accordance with it found that Taylor had breached the contract and therefore declared the contract forfeited and all of Taylor's rights under it terminated. Specifically, the Master found that Taylor violated the terms of the contract in the following manner:

(a) He did not pay the full amount of the \$7500.00 cash down payment required under the contract;

(b) He did not pay the real estate taxes for the years 1954, 1955, and 1956, as required by the contract;

(c) He did not keep in force the required insurance policies on the premises; and

(d) He did not keep the premises in good repair as evidenced by complaints filed by the City of Chicago.

Plaintiff contends that he paid the full down payment of \$7500.00 and that he is not in default in the payment of taxes, in the maintenance of insurance, or of any terms of the agreement. Taylor therefore asked that the forfeiture be set aside and insists that the accounting should show that he is entitled to a deed to the property.

The evidence is clear that Taylor did not pay the down payment of \$7500.00 on the day the agreement was executed. Taylor's testimony is that the \$5,000.00 deposit retained by Brown on their previous lease and a number of other transactions between the parties, some related to the property and some not, both prior to and at the time of the execution, satisfied the down payment. Brown testified that she only received \$3,000.00 as the lease deposit and that Taylor paid approximately \$2,000.00 for furniture left on the premises by Strode, which furniture,

she testified, was later removed from the premises in question by Taylor. The evidence further shows that Taylor did not maintain the insurance policies as provided in the agreement and had not complied with the insurance provisions within thirty days of the notice of the forfeiture. While there is an indication that the property was subsequently insured by Taylor, the forfeiture on that default was valid.

Brown claims that the sale price was reduced by the parties from \$35,000.00 to \$33,500.00 upon the oral agreement of Taylor to pay the 1954 and 1955 real estate taxes then past due. Taylor admits liability for the 1955 taxes as part of the agreement and that he still owes for the 1955 taxes, but denies liability for the 1954 taxes. While we believe liability on the 1954 taxes would be barred by the parol evidence rule, there is evidence in writing plus admissions by Taylor that the obligation to pay 1955 taxes existed and that it was to be regarded as part of the contract, rather than a separate agreement, and therefore subject to the forfeiture provisions.

There is considerable conflicting evidence on every point in issue. We have reviewed the entire record and it appeared to us that the attorneys and the Master had considerable difficulty in obtaining from the litigants factual testimony that would clearly explain their many transactions. The testimony reveals personal loans between the parties and participation in the maintenance of the property by both of them. Taylor and Brown conducted themselves as if the property was still on a lease basis instead of a contract for purchase as evidenced by

the fact that Brown, at her own expense, contracted for repairs in the premises without consulting Taylor and without any opposition from him.

It is well established that where a Master in Chancery hears evidence and makes findings thereon, and such findings are approved by the Chancellor, who considers the evidence on exceptions taken thereto, such findings will not be disturbed by the reviewing court unless manifestly against the weight of the evidence. *Spindler v. Krieger*, 16 Ill. App. 2d 131. The findings of the Master as approved by the Chancellor must stand unless clearly against the weight of the evidence. *Ginther v. Duginger*, 6 Ill. 2d 474. We may not overturn this Decree merely because we might disagree with it or might, had we been the trier of the facts, have come to a different conclusion. *Rude v. Seibert*, 22 Ill. App. 2d 477. The finding that the contract was validly forfeited and all rights thereunder terminated was supported by evidence, and will be affirmed.

Plaintiff also contends that it was improper for the court to enter judgment for \$22, 823.11 against him after declaring all payments by him on the contract to be forfeited. Plaintiff argues that when all payments on the contract are forfeited, a claim for damages is waived.

Brown in her counter-complaint asked for an accounting and judgment thereon only as alternative relief in the event that her attempt to terminate and forfeit the contract was not upheld. As the lower court properly upheld the forfeiture, this disparity between the relief requested by the parties and that granted by the court in also entering judgment

based on the accounting would alone require that we reverse that part of the decree ordering a money judgment for Brown based on the accounting. Further, while we do not deem it necessary to discuss the individual items in any great detail, we find that this judgment would have been improper regardless of the relief requested by the parties, particularly in view of the court's determination that the contract had been terminated.

Much of the accounting is concerned with amounts due Brown under the contract, and offsetting credits claimed by Taylor. These include the required down payment, with credits claimed and allowed for the \$3,000.00 paid on the security deposit under the prior lease, for two prior loans and a payment of attorney's fees, and for Taylor's assumption of Brown's indebtedness to Redel in two instances; Taylor's note to Brown as part of the down payment, less payments thereon; taxes for 1954, 1955, and 1957, less Taylor's partial payment on the 1957 taxes; and monthly contract payments claimed due for January and February, 1957, and April, May, and October, 1958. A judgment on these findings would in effect force Taylor to perform the contract, a result wholly inconsistent with the court's determination that the contract and all rights thereunder have been terminated. While Brown may have had a right to compel Taylor to perform this contract or to declare it forfeited, she cannot have both. See *Paoli v. Zipout, Inc.*, 21 Ill. App. 2d 53; *First Nat. Securities Co. v. Ward*, 275 Ill. App. 521. Nor can these items be upheld as damages due Brown for Taylor's breach of the agreement; they are not a proper measure of damages,

but even if they were, they would be superseded by the provisions of the contract itself which provide that, in the event of termination, all sums previously paid shall be forfeited in full satisfaction and as liquidated damages. *Resnick v. Golik*, 334 Ill. App. 266. We believe that this provision for liquidated damages is reasonable in view of all the circumstances and does not operate as a penalty for non-compliance with the contract. Since the parties have themselves provided for the measure of damages here, they will be bound by this agreement.

The Master's Report allows Brown \$2,800.00 which she claims she paid for rehabilitation work done to the building in the summer of 1957, and \$10,000.00 said to represent approximate preliminary estimates by contractors of the cost of rehabilitating the premises to comply with the building code. There is ample evidence that the City of Chicago has charged that the building contains numerous violations of the building code. Some previous complaints had been remedied, but apparently a great many are still pending. However, we find no basis for holding Taylor liable for these items. The articles of agreement are completely silent as to maintenance of the building, but even if they provided for repairs, we have already pointed out that the contract is terminated and all damages thereunder liquidated. Brown incurred the \$2,800.00 expense by sending workmen in to make certain repairs on the building without ever consulting Taylor. As to the \$10,000.00 estimate, there is not only no apparent legal basis for holding Taylor liable for such an item, there is also no evidence whatsoever in the record regarding the amounts, even as the approximate preliminary estimate which it purports to be. In the absence

of evidence, we could not uphold a judgment for this amount, even if we could discover any sound basis in law for holding Taylor liable for these repairs.

The Master also finds Taylor liable for \$2,500.00 in attorney's fees under the contract provisions which allow the seller to recover costs and attorney's fees incurred in enforcing the contract. The record is wholly silent as to attorney's services rendered or their value, and in the absence of any evidence which could furnish a basis for this award, we cannot permit the allowance for attorney's fees to stand.

Finally, the accounting allows Brown a credit of \$1,900.00 representing money owed by Taylor to one Resnik for installing a boiler in the building. No mechanic's lien was found to exist as a result of this installation. Aside from the fact that Resnik testified that about one-third of this amount has been paid, this is a matter between Taylor and Resnik, and cannot be the basis of a judgment for Brown against Taylor.

For the reasons we have stated, we hold that the decree should be affirmed inasmuch as it finds the contract forfeited and all rights of Taylor thereunder terminated and only the Master's costs and court reporters' fees of \$1,233.90 be assessed against Taylor. We reverse that part of the Decree which orders judgment entered against Taylor in the sum of \$22,823.11 based on the accounting.

DECREE AFFIRMED IN PART
AND REVERSED IN PART.

KILEY, P. J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

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48306

WASHINGTON PHOTO ENGRAVING COMPANY,
a corporation,

Appellee,

v.

LEONARD PIKE,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO

31 I.A.^{2d} 113

MR. JUSTICE FRIEND delivered the opinion of the court:

The plaintiff corporation brought suit to recover a balance of \$4275.00 due on a promissory note for \$6000.00. Defendant answered, denying liability and averring that the note was part consideration for an oral agreement of employment which plaintiff had breached, and also counterclaimed for damages resulting from breach of the oral agreement. After answering the counterclaim and setting up certain affirmative defenses, plaintiff moved for summary judgment on its claim and the counterclaim. Affidavits were filed in support of and in opposition to the motion for summary judgment, and after extended argument by counsel, the court entered judgment for plaintiff on its claim and against defendant on his counterclaim, from which this appeal is taken.

As ground for reversal, it is urged that since there were various triable issues of fact, summary judgment should not have been entered. The facts are relatively simple. Defendant had been in the employ of the plaintiff corporation for about thirteen years under a union contract and as a union member. On October 21, 1958 he borrowed \$6000.00 which he

needed as a down payment on a home which he contemplated purchasing, and gave his note for that amount. He admits that he received a check for \$6000.00 and that he executed the note, both on the same day. There is no genuine issue as to any material fact relating to the execution and delivery of the note and the payment of the \$6000.00. This is admitted by his answer and not contradicted by defendant's affidavit. The note provides for payment "at the rate of \$25.00, or more, per week, commencing on October 28, 1958, until paid in full." Among the various defenses interposed, defendant contends that this provision was surreptitiously inserted in the note after it was executed, but plaintiff's bookkeeper states in her affidavit that she typed the note and that the \$25.00 payment provision was included in the note when she prepared it. Moreover, it is admitted in the pleadings and defendant's affidavit that he made weekly payments of \$25.00 until about October 1959, reducing the indebtedness from \$6000.00 to \$4275.00. On October 14, 1959, several months after the relationship of employer and employee terminated, defendant wrote the following letter in longhand to Bernard W. Landy, president of the plaintiff corporation:

"Dear Bernie:

"This is a note I am writing that I hoped I could avoid.

"Due to the fact that I am not working I am unable to continue the payments at the present time. I will resume them just as soon as I am able as I have not let them lapse in the past.

"Hoping you will bear with me thru the existing circumstances, I am,

"Yours truly,
"Leonard Pike"

No attempt is made by defendant, either in his pleadings or affidavit, to explain this letter, nor to deny Landy's assertion in his affidavit that the letter was in defendant's handwriting--a photostatic copy of which is attached to Landy's affidavit.

Considered in the light of the existence of the note sued on and the payments which were made regularly until two weeks before the date of the letter, as appears from the affidavit of the corporation's bookkeeper, the letter becomes a written reaffirmation of the debt that is not denied by defendant.

As another defense it is urged that the consideration for the loan was an oral contract for "permanent employment." Defendant states in his affidavit that he had expressed dissatisfaction with the conditions of his employment and threatened to leave the company because he had attractive offers elsewhere, and that as an inducement to his remaining in the employ of the plaintiff corporation, Landy orally promised to keep defendant employed for life, and gave him an "advance" of \$6000.00. The purported oral agreement is significantly vague; it does not provide for wages, hours, or duties, nor does it indicate the date of its offer. Moreover, it appears from one of plaintiff's affidavits that during the entire period of defendant's employment with the corporation he was a member of Chicago Photo-Engravers' Union No. 5, that during this period the corporation had operated under written contract with the union and its members with respect to all the terms and conditions of employment of the union members, that the contract



between the corporation and the union was the only contract of employment that had existed between the corporation and defendant and was the only contract by which the corporation and defendant had been bound. It further appears that the agreement contained a provision that "no individual contracts or understandings conflicting with this agreement shall be entered into, or ever entered into, that shall not be valid"; and that defendant as a member of the union had agreed to abide by the rules of the union.

Defendant's affidavit is silent on the question of the union contract. It was logical for the court to find, as it did, that a union member who was bound by a contract with the employer, made on his behalf, could not make an independent contract with the employer in contravention of the union rules to which he had subscribed.

In support of his counterclaim defendant contends that he was "fired" and that he is entitled to damages by reason of his wrongful discharge. In his affidavit he does not specify when he was discharged, nor does he assign any reasons therefor. Moreover, the "Dear Bernie" letter, written after his alleged discharge, indicates an admission of his continuing obligation; in fact, he paid on account of the note after his discharge. The plaintiff corporation submitted three affidavits relating to the termination of defendant's employment. Joseph Saruk, an employee of the corporation since June 22, 1959, stated that he has known defendant for many years; that on July 22, 1959, defendant told him that "he was quitting his job and that he had notified Bernard W. Landy, President of said . . .

Company, that he was resigning his position with the said . . . Company, said resignation to take effect at the end of the week of July 20, 1959"; and that defendant did not return to his job after that week. Muriel Boris, who had been in the employ of the corporation for thirteen years in its executive offices, stated that on July 20, 1959 she was present and heard a conversation between Landy and defendant wherein the latter said that he was resigning his position, his resignation to take effect at the end of the week of July 20th, and that at the end of that week he did not return to his job. Landy stated that on July 20, 1959 defendant came to his office and in the presence of Muriel Boris advised him that he was leaving the employ of the corporation at the end of that week; that Landy asked why he was quitting and was informed "that he had 120 or more reasons for wanting to leave"; and that at the end of that week he did in fact quit his job and failed to report for work thereafter. These circumstances, together with his own declaration that he had threatened to resign because he had more attractive offers, leave little room for doubt that the termination was of his own choosing. It should also be noted that for several weeks after July 20, 1959 he continued to make weekly payments of \$25.00 on the \$6000.00 note.

Defendant further argues that plaintiff was not entitled to sue for the entire balance due, but would be required to sue each week for the \$25.00 installment. As a matter of fact, defendant repudiated the entire agreement to pay \$6000.00 at \$25.00 a week by claiming "that the said note

was part of the consideration for an oral agreement of employment which Plaintiff-Appellee had breached." This oral agreement provided, according to defendant, that he was to be employed for life, but it contained no provisions with respect to duties or salary. Although defendant admits receiving plaintiff's check, which he promptly deposited in his bank account, he claims failure of consideration for the note because of his alleged discharge. The rule is well settled that breach of an agreement, coupled with a repudiation thereof, allows the injured party the full remedy at the time of the breach, without having to wait for each installment to come due. *Bonde v. Weber*, 6 Ill. 2d 365 (1955); *Kinnan v. Hurst Co.*, 317 Ill. 251 (1925); *De Leuw, Cather & Co. v. City of Joliet*, 327 Ill. App. 453 (1945); *Federal Life Ins. Co. v. Rascoe*, 12 F.2d 693 (6th Cir. 1926); 12 I.L.P. Contracts § 422; *Williston on Contracts* (1937) §§ 1314, 1317, and 1323. It thus appears that the doctrine of anticipatory breach has gained acceptance in the State of Illinois--indeed, with the exception of Massachusetts and possibly Maine, this doctrine may be considered to be the law in all American jurisdictions (*Anderson, Repudiation of Contract--the Post-Restatement Cases*, 6 DE PAUL L. REV. 1, 9 (1956))--and defendant's cases, decided in the nineteenth century, are no longer controlling.

The remaining ground urged for reversal is that the court denied defendant's motion for change of venue. Section 6 of the Venue Act (Ill. Rev. Stat. 1959, ch. 146) prescribes the applicable conditions under which such motions may be

allowed. It appears that at a preliminary hearing the court expressed doubt as to the validity of the claims embodied in the answer and counterclaim on the basis of the alleged uniqueness of the employment relationship. It was long after this that the motion for change of venue was made. Obviously defendant was disturbed because of the court's views. The hearing on the merits was set down for a day certain, several weeks thereafter. Prior to the trial date, plaintiff had served notice of its motion for summary judgment, together with affidavits in support thereof, and conversations were had between the respective counsel wherein defendant sought additional time to file a counteraffidavit. Nothing was said during these conversations indicating that a motion for change of venue was contemplated, and it was not until the case was actually called for trial that the motion was presented. In *Ostrow, Inc. v. Boydston Bros.*, 323 Ill. App. 137, 142 (1944), the court adopted the language used in *In re Wheeling Drainage Dist. No. 1*, 282 Ill. App. 565, 568 (1935): " . . . It would be improper for counsel to try out the attitude of a trial judge by questions and discussion and argument, and if the court was not in harmony with counsel's views to then assert that the court was prejudiced and that a change of venue must be allowed. This practice will not be countenanced. . . ." Defendant did not comply with the provisions of the Venue Act. From the record it appears that he knew of the alleged "bias" at least forty days before he made his motion, and accordingly the court properly held that the motion came too late.

We are satisfied that there were no triable issues of fact, and that the court properly entered the summary judgment from which defendant appeals. It is therefore affirmed.

JUDGMENT AFFIRMED

BURKE, P.J. and
BRYANT, J. Concur

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APPEAL FROM

SUPERIOR COURT

COOK COUNTY

31 I.A. 114^{2d}

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La Verne A. Libretti and John L. Libretti were married at Kansas City, Kansas, on February 6, 1945. Three children were born to them, John, Linda and Samuel. The parties lived as husband and wife until December 24, 1958. In an amended complaint for divorce the wife charged that her husband was guilty of extreme and repeated cruelty towards her on June 13, 1958, and August 15, 1958. He denied the charges. In a separate complaint for divorce he charged that she wilfully deserted and absented herself from him beginning December 23, 1958, that she openly consorted with one Nick Brown, and that she was unfit to have the care and custody of the children. She denied these charges. The cases were consolidated. The decree sustained the charges of cruelty, found that she is a fit and proper person to have the care, custody and education of the children, severed the bonds of matrimony, awarded the care, custody and education of the children to the mother with right of visitation to the father, required him to pay attorney's fees, alimony, child support and certain expenses,

awarded a divorce on the ground of desertion and custody of the children.

Plaintiff was the only witness to testify as to any acts of cruelty. She testified that he hit her on June 13, 1958, and on August 15, 1958, and that they separated on December 24, 1958. He denied beating her at any time. No one saw any marks or bruises on the plaintiff. She had been keeping company with Nick Brown for more than a year prior to the separation, stayed out with him all night on at least one occasion, and during these intrusions neglected her children.

In *Whitlock v. Whitlock*, 268 Ill. 218, the court said (228): "There should be evidence of such acts as would constitute sufficient cause for divorce under the circumstances besides the evidence of the party to the suit who makes such charges, where such acts are denied." In *Tesar v. Tesar*, 13 Ill. App. 2d 478, the court said (481):

"There was no attempt to corroborate the alleged first act of cruelty. We have held that a divorce will not be granted upon uncorroborated testimony as to alleged acts of cruelty. *Coolidge v. Coolidge*, 4 Ill. App. 2d 205, 216. In *Jackson v. Jackson*, 294 Ill. App. 552, the chancellor's finding that the husband was guilty of cruelty was reversed because there was corroboration only as to one of the charges."

The evidence establishes that the separation was caused by the plaintiff. Her affair with Nick Brown contributed to the separation. Her sister's husband, who was a witness for plaintiff and who was friendly to her, testified that he endeavored to persuade Nick Brown to stay away from plaintiff. The evidence does not establish that she was guilty of adultery. It does establish that she wilfully deserted him

without reasonable cause beginning December 24, 1958, and that she persisted in the desertion. We are not in a position to say which party should have the custody of the children. The mother has had them for more than two years. In deciding the question of custody primary consideration is given to the welfare of the children. The decree is reversed and the cause is remanded with directions to dismiss La Verne A. Libretti's amended complaint for want of equity, enter a decree for John L. Libretti severing the bonds of matrimony on the ground that she wilfully deserted him without any reasonable cause for the space of more than one year, conduct a hearing as to the custody, care and education of the children and the amount to be awarded for their custody, care and education, and award a reasonable amount to plaintiff for attorney's fees, costs and expenses should the hearing result in an order awarding the custody to her.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS

FRIEND, J., and
BRYANT, J., Concur

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APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

31 I.A.^{2d} 139

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appeal from that order.

Neither Mrs. Berry nor the Standard Bank has filed an appearance or brief in this court.

The plaintiffs rely upon Leaf v. McGowan, 13 Ill. App. 2d 58 (1957), 141 N.E.2d 67, for the reversal of the court's order. In that case this court, after reviewing the differing decisions of the courts which had considered the problem, held that a joint bank account can be garnisheed by a judgment creditor when one of the parties to the account is the judgment debtor. The opinion said:

"...we are of the further opinion that if a garnishee answers that a judgment debtor holds money in a joint bank account, this is sufficient proof to establish a prima facie case for the judgment creditor that the money in the account belonged to the judgment debtor. The burden is then upon the other party to the joint account to prove what part, if any, of the funds in such account belonged to him."

Under the holding in the above case, a prima facie case was established for the plaintiffs when the Standard State Bank answered that it had an account in the name of one of the judgment debtors or Helena Berry. The burden then became Mrs. Berry's to prove ownership of the money in the account. In their brief, and in the oral argument before our court, the plaintiffs insist that the burden was not met. They assert that the trial court heard no evidence, refused to listen to the submission of law and summarily ruled against them.

Their contention is not corroborated by the record. The record before us does not include a report of proceedings

or an approved statement of facts showing what took place at the hearing. It does contain the court's order which states that evidence was heard:

"...the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, enters the following finding, to wit: 'the court finds for adverse claimant Helena Berry.'"

In view of this order, and because there is no report of proceedings at the trial, we must assume that evidence was heard and that the evidence supported the decision of the court. People ex rel. Rose v. Craig, 404 Ill. 505, 89 N.E.2d 409; City of Chicago v. Porter D. Campbell, 27 Ill. App. 2d 456, 170 N.E.2d 19; City of Chicago v. Franks, 22 Ill. App. 2d 536, 161 N.E.2d 354.

The judgment of the Municipal Court is affirmed.

Affirmed.

Schwartz, P.J., and McCormick, J., concur.

Abstract only.

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APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

CIRCUIT COURT OF

COOK COUNTY.

31 I.A.^{2d} 190

Plaintiff, a real estate broker, brings this action against the vendor and purchaser of the realty in question, on two counts; count one alleges that the defendant McDonnell, the vendor, breached his oral agreement to pay a real estate commission to the plaintiff, and count two alleges a conspiracy by both defendants to defraud the plaintiff of this real estate broker's commission. The plaintiff seeks the payment of \$15,900 for his services in procuring a purchaser for the property, and \$15,900 as damages as the result of the alleged conspiracy.

Defendant McDonnell moved for a summary judgment "for the reason that on or about the 17th day of April 1958 and prior to the alleged sale of the real estate in question, the Real Estate Brokerage Contract alleged in the Complaint was terminated by the abandonment by the Plaintiff of his efforts to conclude the sale upon which his Complaint is based...". The motion was accompanied by his supporting affidavits and documents, and affidavits from his other broker, John Usher; his son, John R. McDonnell, who served as his agent in the transaction; the purchaser's agent,

John Bartolomeo; and the purchaser, the defendant Howard B. Quinn. Defendant Quinn subsequently moved for a summary judgment and denied under oath the allegations made against him. The court granted the motions for summary judgment and the plaintiff brings this appeal.

This court, as a reviewing court, is not bound by the precise reasons given by the trial court in entering the summary judgment. *National Gas & Oil Co. v. Rizer*, 20 Ill. App. 2d 332, 336. The whole record must be considered. *Gliwa v. Washington Polish Loan and Building Ass'n*, 310 Ill. App. 465, 471. All the issues involved in the pleadings were before the trial court upon the summary judgment motion by reason of the plaintiff's waiver of his objection by asking leave to file additional affidavits, obtaining the same, and averring facts related to other issues created by the pleadings other than abandonment. *Smith v. Karasek et al.*, 313 Ill. App. 654 (Abst. #41681, p.2); *Village of Forest Park v. Collis et al.*, 329 Ill. App. 273 (Abst. #43529, p.5); *Williams v. A.J. Stevens, Trustee*, 335 Ill. App. (Abst. #44241, p.3). Accordingly, the question as to whether the plaintiff was the "procuring cause" of the sale will also be considered along with the issue of abandonment.

The essential facts underlying this controversy are not in dispute. The defendant George J. McDonnell was the owner of two blocks of vacant real estate on the southeast corner of 79th and Western Avenue in Chicago, except for two lots in Block #1 and two lots in Block #2. In 1955, the

plaintiff was granted a "non-exclusive" right to list the property.

In November 1956, the plaintiff purchased the two lots in Block #1 for \$7,000 and in March 1957, he purchased the two lots in Block #2 for \$13,000, so that he was thereafter able to advertise the entire two blocks for sale as a single unit for development. He advertised the entire two blocks for sale in the newspapers and in the property signs which he erected on the property.

In May 1957, the plaintiff arranged a meeting between McDonnell, the owner, and Quinn, a builder and real estate developer. The plaintiff submitted a signed offer by Quinn for \$275,000, but the defendant McDonnell rejected the offer and stated that his terms were: "\$300,000 cash, to be closed through a deed and money escrow". There was no written contract executed and no time limit set for opening of the escrow nor for the closing of the transaction as a whole.

On June 8, 1957, the plaintiff sent the defendant McDonnell a letter saying that "Mr. Quinn has been liquidating assets here and in Florida as rapidly as possible and states he should be ready to close in the near future." On July 31, 1957, the plaintiff sent the defendant McDonnell another letter, informing him of Quinn's difficulties in obtaining financing. He says in closing: "We all appreciate the time that has been involved, and your patience is deeply appreciated by me, also know Mr. Quinn is very unhappy with

this long delay and is doing his best to move it to a conclusion he states that this lengthy delay and tie-up of capital is costly to him also. I know that he has Bartholamew the architect working on plans and sketches for some time now for the improvements to be built." On April 17, 1958, the plaintiff sent the defendant McDonnell another letter, in reference to the sale of the 79th street property:

...

"Have been sitting around for some time and thought I would try again to get a contract on your property, so with that idea in mind I have done some advertising and promotion with a sales price for your property of \$325,000.00. To date I haven't been able to contract a interested party but am still trying, of course I know you want an all cash deal, no contracts or cutting up of the property.

Was very disappointed in Howard Quinn not being able to follow through with the purchase, Lord knows he had enough time to do so; he is still interested but that does not put the money in the pocket.

Just thought I would drop you this note so if something does materialize you would be aware of the effort made to promote the property again. Other than that I hope your enjoying this warm weather we have all been waiting for and will have a nice summer.

Sincerely yours,

s/Arthur M. McKown, Jr."

This was the last communication the defendant McDonnell had with the plaintiff in reference to the arrangement with Quinn. McDonnell said that he "verily believed that the attempted purchase and sale had failed."

In November 1958, the defendant George J. McDonnell was confined to a hospital where he remained until

March 1959. He entrusted the execution of the transaction to his son, John R. McDonnell.

Also in November 1958, the plaintiff made arrangements to sell the four lots of Block #1 and #2 to Quinn, with a closing date set for April 1, 1959. The contract between the plaintiff and Quinn for the sale of the four lots showed a sales price of \$25,000 or \$5000 more than McKown paid for these lots. The plaintiff said that the sole purpose for selling the lots to Quinn was to facilitate the eventual sale of the McDonnell property; however, McDonnell was not informed of the sale. The plaintiff said that he "felt there was no reason to bother Mr. McDonnell with what appeared to be a preliminary matter to his main interest, which was the sale of his property."

In December 1958, John Bartolomeo, a licensed architect, contacted Mr. Usher, one of the defendant McDonnell's other brokers, and expressed interest in purchasing the property. Usher suggested an arrangement whereby the property would be "conveyed by three separate Deeds, each conveying approximately one-third of the property, the first of said Deeds to be recorded after the Owner's Title was found to be in order and the initial payment of \$100,000 had been deposited by John Bartolomeo; that the Escrow provide for a further deposit of an additional sum of \$15,000 to provide a fund to be paid to the Owner in the event the remaining deposits of money were not made in the Escrow and the entire transaction was not consummated; that a second

deposit of \$100,000 be made approximately in the middle of the year and, if made, that the Deed to the second group of Lots be then recorded; that the final payment of the purchase price, which would be then \$85,000 should be made on or before the end of the year and in the event the deposit were made the last Deed of conveyance would be recorded; ...".

Usher pointed out that the property to be conveyed by the first deed was substantially less valuable than the other property and that the owner would be receiving a sum far in excess of the fair market value of the lots by this method; and with the \$15,000 for liquidated damages, the owner would be more than amply protected in the event that the prospective purchaser was unable to complete the transaction.

This new arrangement for the sale of the property, as suggested by Mr. Usher, was the one that was finally adopted, and the prospective purchaser was not required to pay the entire sum of \$300,000 and to take title to all of the lots at one time.

John Bartolomeo directed that the deeds be so drawn as to convey the land in question to the American National Bank and Trust Company as Trustee Under Trust No. 14201, however, the identity of the beneficial interest in the land trust was not disclosed at the time of the sale. It is now established that John Bartolomeo was acting as the agent of Howard B. Quinn in procuring the property in question, although the defendant McDonnell was unaware of his role in the transaction. There is no contention on the

part of the plaintiff that the transaction was based upon a desire to avoid paying a broker a commission. In fact, the defendant McDonnell agreed to pay a substantial commission to another broker, John Usher, for his services in arranging the sale.

The plaintiff contends that the defendant McDonnell knew that Bartolomeo was an agent for Quinn or is chargeable with knowledge of this. However, the only basis for this assertion is the reference to a "Bartholamew" in the plaintiff's letter of July 31, 1957. Defendant McDonnell swore that he "at no time connected plaintiff's statement in his letter of July 31, 1957 regarding 'Bartholamew' with the purchaser, 'John Bartolomeo'. That at the time John Usher mentioned the name 'John Bartolomeo' one and one-half years approximately had expired since the receipt of said letter of July 31, 1957."

Plaintiff recognizes the fact that in order to be entitled to the commission, he must be the procuring cause of the sale that was consummated. It is clear from what we have said earlier that there were fundamental differences between the sale negotiated by Usher and the sale the plaintiff was unable to close with Quinn as his customer. As the defendants properly point out, none of the plaintiff's efforts with respect to Quinn entitles him to a commission; that he first introduced Quinn to the property and the owner does not do so; (*Friend et al. v. Charles W. Triggs Co.*, 147 Ill. App. 427, 430); that he had negotiations with Quinn does not do so; (*Burns v. Sullivan*, 192 Ill. App. 127); that he

influenced Quinn does not do so; (White v. Sellmyer, 157 Ill. App. 435). As the court said in Chicago Title & Trust Co. v. Guild, 323 Ill. App. 608, 614, "Unless he specially agrees not to do so, an owner of property may employ two or more brokers; in such case it is the broker who is the efficient cause of the sale who is entitled to commissions; and this right is not affected by the fact that such broker sells to one whose attention to the property had before been called by another broker."

The plaintiff's second count on the theory of a conspiracy between the defendant McDonnell and the defendant Quinn fails on the ground that the defendants owed the plaintiff no duty to deal exclusively with him. Defendant Quinn failed to make an advantageous deal through the plaintiff, so he attempted to gain his goal by proceeding through a nominee and a different broker. This broker was able to obtain a more advantageous agreement, close the deal and earn the commission. Quinn was not required to do all his negotiating thereafter with the plaintiff. Similarly, McDonnell has done only that which he had every legal right to do. He sold his property through the broker who produced a ready, willing and able purchaser, who could and did consummate the transaction. In all this, there is no wrong that would give rise to a cause of action independent of the conspiracy. Without this independent wrong, the conspiracy fails as a cause of action. Knaus v. M.R.C. Finance Corp.,

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327 Ill. App. 214; Aaron v. Dausch, 313 Ill. App. 524.

Summary Judgment in favor of defendants McDonnell
and Quinn is affirmed.

JUDGMENT IS AFFIRMED.

BURKE, P.J., and
FRIEND, J. Concur

48235

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

PHILLIP H. WILLIAMS,
Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

81 I.A. 230

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On September 23, 1959, an Information was filed charging Phillip H. Williams with driving an automobile while under the influence of intoxicating liquor. On the following day he was released from custody on bond and has retained his freedom on bond until the present time. On May 20, 1960, the defendant was found guilty in manner and form as charged in the Information. A post-trial motion for discharge on the ground that he was not tried within four months under the provisions of Par. 748, Ch.38, Ill. Rev. Stat. 1959, was denied. Judgment was entered on the verdict and he was sentenced to serve a term of 30 days in the county jail. He appeals.

The only point presented is that the court erred in refusing to discharge defendant for want of prosecution when he was not brought to trial within four months. The statute provides that any person who shall have been admitted to bail for an alleged offense shall be entitled on demand to be tried within four months after such demand. The record does not reflect any demand for trial on the part of the defendant. It shows that on September 24, 1959, the case was continued to October 15, 1959, on defendant's motion. The record also shows

163 E. 2d 14

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continuances on motion of the People. The record says that on January 15, 1960, by agreement of the parties, the cause was continued to March 11, 1960. Since the trial was begun on May 16, 1960, it is obvious that there was compliance with the Four Months Act because the People had until July 12, 1960, to bring defendant to trial. In *People v. Rankins*, 18 Ill. 2d 260, the court said (262): "We have repeatedly held that where a defendant has sought and obtained a continuance within the period in question . . . the right to be tried within the four-months period is temporarily suspended . . . and the statute does not apply until a new four-months period has elapsed."

On January 14, 1960, defendant filed a motion for change of venue, which was allowed, and the cause was reassigned to another judge. The cause was then continued until March 11, 1960. It has been consistently held that where a failure to try the defendant within the time prescribed is occasioned by the defendant, the statute does not apply. In *People of the State of Illinois v. Iasello*, 410 Ill. 252, ^{102 N.E. 2d 1384} the court held that when a defendant moves for a change of venue, he creates the necessity for postponement and cannot avail himself of the four-month statute.

Defendant's attorney by verified petition and testimony before the trial judge sought to establish that the record is in error in showing an order by agreement entered January 15, 1960, postponing the case until March 11, 1960. The record of a court imports absolute verity and cannot be contradicted or amended, except by other matter of record by or under the authority of the court. *People of the State of*

8847
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Illinois v. Forsyth, 339 Ill. 381, 383. It is interesting to note that defendant's verified petition recites that on March 11, 1960, he requested a continuance for the reason that one of his witnesses had broken a leg and could not appear at the trial, and that thereupon the court continued the case until April 14, 1960, on motion of the State's Attorney. Obviously if the defendant was not ready for trial on March 11 and he asked for a continuance, even though the order was entered on motion of the People, the Four Months Act was tolled and would not expire again until four months from the new trial date, which would have been August 15, 1960. His trial began on May 16, 1960.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., and
BRYANT, J., Concur.

8850

48285

CLARENCE A. CEJKA,

Appellee,

v.

R. MERSEBURGER,

Defendant below

OLGA MERSEBURGER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

31 I.A.^{2d} 265

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago entered in a forcible detainer suit upon a verdict returned by a jury finding that the plaintiff was entitled to possession of the premises involved.

One Richard Merseburger had occupied the premises located at 3922 North Newcastle Avenue, Chicago, Illinois as a tenant. The plaintiff owned the premises. Richard Merseburger died September 3, 1954. Olga Merseburger continued to occupy the premises as a tenant. The plaintiff filed a forcible detainer suit in the Municipal Court of Chicago. The caption of the suit was "Clarence A. Cejka v. R. Merseburger." The bailiff was directed to serve R. Merseburger at the premises. He made a return stating that he had served the writ on the named defendant, R. Merseburger, by delivering a copy to him with a praecipe and statement of claim and affidavit attached thereto, and at the same time informing him of the contents thereof.

Olga Merseburger entered a special and limited appearance for the purpose of objecting to the jurisdiction of the court, and filed with it a motion to quash the service of process and an affidavit in which, among other things, she stated that she was the daughter of the named deceased defendant, R. Merseburger, that she had never been named or known as R. Merseburger or represented herself as such, and that service of process was made upon her as R. Merseburger. The court overruled the motion and ordered that the special appearance stand as a general appearance. Olga Merseburger thereupon filed a jury demand, which jury demand was, as the court finds from an inspection of the record and the original files of the Municipal Court of Chicago, in words as follows: "Olga Merseburger, Defendant, demands trial by jury and consents to trial by jury of six jurors," and was signed by the attorney for defendant. Another motion was filed on behalf of Olga Merseburger suggesting the death of the defendant and moving to dismiss the suit. The affidavit filed by Olga Merseburger in support of that motion was substantially the same as the one filed to the first motion, and had attached to it a certificate of death of Richard Merseburger.

The case was tried before a jury in the Municipal Court of Chicago. The trial was participated in by Olga Merseburger represented by her attorney. The jury returned a verdict finding in favor of the plaintiff and against the defendant, and upon that verdict the court entered the judgment.

The plaintiff's motion at the close of all the evidence for a directed verdict in favor of the plaintiff and against the defendant "Olga Merseburger, also known as R. Merseburger" was denied, and the court's judgment order recites that at the close of all the evidence "the motion of defendant for a directed verdict" was denied and that the motion of plaintiff made after judgment to correct the name of the defendant was denied. After judgment, post-trial motions were filed in behalf of Olga Merseburger: a motion for judgment notwithstanding the verdict and in the alternative a motion for a new trial. Neither of these motions was abstracted. Both motions were denied by the court and Olga Merseburger filed a notice of appeal to this court "from the verdict and judgment thereon entered in the above entitled cause on the 4th day of August, 1960, wherein and whereby it was adjudged that plaintiff Clarence A. Cejka was entitled to the possession of the premises * * *." She thereupon filed an appeal bond which was approved by the court.

The case presents a comparatively simple problem complicated by the method in which it was presented to this court.

The contention of the plaintiff is that Olga Merseburger, as occupant and tenant of the premises in question, was the real party in interest, that the suit was started against her under the name of R. Merseburger and the bailiff so served her, that after the denial of her motions attacking the jurisdiction of the court over her

person she demanded a jury trial, participated in the trial of the case, made a motion for a directed verdict, filed post-trial motions, a notice of appeal and an appeal bond, and that by so doing she waived any right to urge error in the trial court's overruling of her jurisdictional motion.

The Practice Act in the revision of 1955, section 20, recites that a special appearance prior to pleading may be made for the purpose of objecting to the jurisdiction of the court over the person of the defendant. Paragraph (1) provides: "* * * Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance." Paragraph (3) provides: "* * * Error in ruling against the defendant on the objection is waived by the defendant's taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amenable to process issued by a court of this State."

The defendant here contends that the suit was brought against Richard Merseburger, deceased, under the name of R. Merseburger, and that the judgment entered was null and void.

The plaintiff in his brief states, and it was admitted on oral argument by the defendant, that certain counteraffidavits were filed in answer to the defendant's jurisdictional motions and he further states that at the trial, though no transcript of the evidence appears before us, Olga Merseburger admitted that she paid rent by checks signed "R. Merseburger" and accepted a letter of attornment directed to R. Merseburger.

These counteraffidavits appear neither in the record nor in the abstract. Consequently we have no way of telling what the court had before it when it ruled on the motions. For Olga Merseburger to fail to include such affidavits in the record, making the contentions that she does, was highly improper. Her counsel contended in the oral argument that Olga Merseburger was not the defendant in the case. He did not indicate who he considered to be the defendant. It could not have been Richard Merseburger. If Richard Merseburger, deceased, was the defendant, then Richard Merseburger as a dead man through counsel was participating in the trial. Olga Merseburger raised jurisdictional objections. They involved questions of fact as to whether she as a real party in interest had been sued and served under the name of R. Merseburger. After a denial of those motions she participated in the trial of the case as well as filed a demand for a jury trial. By so doing she waived any right to contest the propriety of the court's action in overruling her motions. It has been held that "in determining the validity of service, the names by which persons were summoned are immaterial and the essential question is whether the party in interest was actually served." 30 I.L.P. Process, sec. 21; Lau v. West Towns Bus Co., 16 Ill.2d 442, 158 N.E.2d 63; People v. Cottine, 20 Ill. App.2d 562, 569, 156 N.E.2d 774, 778; Livestock Mtg. Credit Corp. v. Keller, 336 Ill. App. 282 286, 83 N.E.2d 356, 358. Section 20 (3) of the Practice Act and the cases cited above hold that where a party appears generally and defends in the suit he is estopped from

denying that he is the defendant in such suit. Also see Feasler v. Schriever, 68 Ill. 322.

No transcript of the evidence heard is before this court. On oral argument the plaintiff alleged that the question as to whether or not Olga Merseburger was the real party in interest sued and served under the name of R. Merseburger was litigated in the jury trial. The post-trial motions are not abstracted. Going to the record we find that in Olga Merseburger's alternative motion for a new trial she objects that the court refused to give the following instruction: "The court instructs the jury that the only point in controversy in this suit is whether or not R. Merseburger is Olga Merseburger." The record bears out the uncontradicted statement of the plaintiff that this question was in issue before the jury. The notice of appeal is "from the verdict and judgment thereon entered." As we have said, we have no transcript of the evidence, Olga Merseburger does not abstract or rely on her post-trial motions, and any question as to whether or not the jury found that issue in the trial of the case against Olga Merseburger cannot be considered by us.

We find that Olga Merseburger having been personally served with process in the name of R. Merseburger and her jurisdictional motions having been overruled by the court, she by her participation in the trial waived any objections she might have had with reference to the court's personal jurisdiction over her and became to all intents and purposes the defendant in the case.

Under the rules of this court the appellant is required to furnish an abstract of the record, and rule No. 6 requires that the abstract shall be sufficient to present the errors relied on. An abstract is supposed to truthfully digest the matters contained in the record. It is true that the rule provides that unless the appellee files an additional abstract the abstract shall be taken to be accurate and sufficient. However, this court is not bound to take an abstract as accurate which palpably changes and distorts the record in the matter purportedly abstracted.

The judgment of the Municipal Court of Chicago is affirmed.

Affirmed.

Schwartz, P.J., and Dempsey, J., concur.

Under the rules of this court the appellant is required to furnish an abstract of the record, and rule No. 6 requires that the abstract shall be sufficient to present the errors relied on. An abstract is supposed to truthfully digest the matters contained in the record. It is true that the rule provides that unless the appellee files an additional abstract the abstract shall be taken to be accurate and sufficient. However, this court is not bound to take an abstract as accurate which palpably changes and distorts the record in the matter purportedly abstracted. Such an abstract is unfair to the court and justifies a censure of the attorney presenting the same. In the instant case, because of the patent variances between the abstract and the record the court found it necessary to carefully compare both instruments and even in one instance to examine the original file of the trial court.

The judgment of the Municipal Court of Chicago is affirmed.

Affirmed.

Schwartz, P.J., and Dempsey, J., concur.

Abstract only.

31 I.A. ^{2d} 271

The action is based upon injuries allegedly sustained by plaintiff on March 5, 1954 when she stepped in a hole in a sidewalk which caused her to trip and fall. The one question presented to us is whether there was such want of evidence to sustain plaintiff's case as to justify the court's ruling. The rule of law is that in passing upon a motion for judgment notwithstanding the verdict, questions involving the credibility of the witnesses, conflicts in testimony and the weight or preponderance thereof may not be considered, but the reviewing court must take that evidence as true which is most favorable to plaintiff's cause of action, and if such evidence and its intendments most favorable to plaintiff tend to establish her case, then defendant's motion must be denied.

Hering v. Hilton, 12 Ill. 2d 559, 563, 147 N.E.2d 311, 314; Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, 583, 69 N.E.2d 293, 300; Busser v. Noble, 22 Ill. App. 2d 433, 441, 161 N.E.2d 150, 154; Foster v. Bilbruck, 20 Ill. App. 2d 173, 180, 155 N.E.2d 366, 370; Green v. Keenan, 10 Ill. App. 2d 53, 134 N.E.2d 115; Greenlee v. Shedd Aquarium, No. 48110, Ill. App. Ct. (1st Dist.), opinion filed February 1, 1961. Accordingly, we must consider the testimony of plaintiff with respect to the accident as if it stood uncontradicted.

Plaintiff testified that as she was walking on the sidewalk at the place in question, she stepped into a jagged hole one or two feet in diameter and three to five inches deep, which caused her to fall and produced the alleged injuries. She had noticed the hole for five or six months before she fell and had often talked about it, but did not see it on the day in question when it was covered with a light layer of snow. This, standing alone, is sufficient to take the case to the jury.

Defendant argues that the City of Chicago is not liable for injuries resulting from the general slipperiness of its streets and sidewalks due to the presence of ice and snow which has accumulated as a result of natural causes. That is a correct statement of the law, but it is not applicable to the instant case. Plaintiff here testified that she stepped into a hole

in the sidewalk, and not that she slipped because of ice. Defendant says there is no credible testimony that the hole was there on March 5, 1954. Credibility, as we have said, cannot be taken into account on a motion for judgment notwithstanding the verdict. We must accept plaintiff's testimony on this point.

Defendant argues that plaintiff failed to exercise due care. Defendant acknowledges the principle laid down in Swenson v. City of Rockford, 9 Ill. 2d 122, 136 N.E.2d 777, to the effect that it is not contributory negligence per se for a person to walk upon a street or sidewalk and to trip over a defect therein of which the person has knowledge. In the instant case defendant again resorts to the charge that the injuries resulted from snow and ice rather than the defect in the sidewalk, but that is not plaintiff's testimony, as we have hereinbefore stated. Under the circumstances, the motion for judgment notwithstanding the verdict should have been denied.

In its motion for judgment notwithstanding the verdict, defendant moved in the alternative for a new trial. When the court allowed the motion for judgment notwithstanding the verdict, it also ordered conditionally that if its ruling should be reversed, defendant's motion for a new trial "be and it is hereby denied." This appears to have been an error. However, no cross-error was assigned

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and we have nothing before us other than the error assigned by plaintiff on the allowance of the motion for judgment notwithstanding the verdict.

The judgment of the trial court is reversed and judgment is entered here in favor of plaintiff for \$1000 and costs.

Judgment reversed. Judgment here in favor of plaintiff for \$1000 and costs.

McCormick and Dempsey, JJ., concur.

Abstract only.

48227

DERRICK BROWN,

Plaintiff,

vs.

JOSEPH J. DUFFY COMPANY, a
corporation and H. P. REGER AND
COMPANY, a corporation,

Defendant,

Counter Plaintiff-Appellant,

MIDWEST HEAT SERVICE,

Intervening Petitioner-
Respondent.

APPEAL FROM THE
SUPERIOR COURT OF
COOK COUNTY

31 I.A.^{2d} 272

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a dismissal of a counterclaim filed by H. P. Reger and Company, one of the defendants, seeking indemnification from plaintiff's employer, Midwest Heat Service, in plaintiff's action for injuries sustained as a result of a violation of the Scaffold Act, Ill. Rev. Stat. Ch. 48, §§60-69 (1955). The trial court found there is no just reason for delaying any appeal in this case. See Ill. Rev. Stat. Ch. 110, §50 (2) (1959).

In his complaint Derrick Brown alleged that the Joseph J. Duffy Company, a corporation, and H. P. Reger and Company, which will hereafter be referred to as Duffy and Reger, constructed, maintained and controlled, as general contractor or subcontractor, certain scaffolding used in the construction of a new building on the northeast corner of 40th Street and Lake Park Avenue in Chicago; that on April 2, 1956, he was injured while using this scaffold planking as an employee of Midwest Heat Service; and that the defendants were in wilful violation of the provisions of Ill. Rev. Stat. Ch. 48, §60 (1955), and Chapter 76 of the Municipal Code of Chicago.

Reger filed an answer in which it admitted being a subcontractor in the construction of the involved building but generally denied all other allegations. Duffy admitted being the general contractor and also generally denied all other allegations. Midwest Heat Service, which will be referred to as Midwest, and which was not a defendant in the original suit, filed an intervening petition with the court's permission stating that at the time plaintiff was injured he was in its employ; that pursuant to the Illinois Workmen's Compensation Act, Ill. Rev. Stat. Ch. 48, §§138.1 - 138.28 (1955), it paid him specified compensation and medical expenses; and that under the same act it is entitled to reimbursement from any sums that may be due plaintiff.

Reger, in its answer to the intervening petition, generally denied the allegations in the petition and filed a counterclaim against Midwest in which it alleged that the latter was a subcontractor on the premises in question; that if Reger is liable to plaintiff it would be only because of a passive role on its part, whereas, Midwest was the active tort-feasor causing plaintiff's injury; and it prayed that, in the event that it was found liable, it have judgment against Midwest for a like amount.

Midwest moved to dismiss the counterclaim on the grounds that any such action was prohibited by the Workmen's Compensation Act of Illinois, under which Midwest paid compensation to plaintiff. In the amendment to this motion Midwest alleged that plaintiff's action is based upon the wilful violation of the Scaffold Act by Reger; that if the action is sustained Reger would be in pari delicto with Midwest; and since there is no contribution among joint tort-feasors in Illinois the counterclaim should fail. The trial

court ordered the counterclaim dismissed. This appeal was taken from that order.

Reger contends that a party whose liability is based on passive negligence can seek indemnity from another party whose active negligence caused the injuries complained of. *Gulf, M. & O. R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148. The Court there recognized that this theory of indemnity was an exception to the general principle of non-contribution between tort-feasors.

Midwest admits that this is the law, but contends that no right of indemnification exists where the parties are in *pari delicto*, or where the party seeking contribution is guilty of a wilful wrong. It argues that if Reger is found guilty the finding would be based on the complaint alleging a wilful violation of the Scaffold Act and that said act imposes no greater or lesser duty upon any of the parties having charge of such construction or work.

Midwest in its brief admits Reger's contention that the Workmen's Compensation Act of Illinois does not preclude an action over in the nature of indemnity against the employer where the employer is the active tort-feasor. *Moroni v. Intrusion-Prepakt, Inc.*, 24 Ill. App. 2d 534. Both parties agree that indemnification will not lie where the parties are in *pari delicto*.

Reger denies any part in the construction or use of any scaffolding and maintains that if found guilty it would be on passive negligence on its part and therefore it would not be in *pari delicto* with Midwest if the latter was held to be the actively negligent cause of the injury. To hold

with Midwest we would have to anticipate a finding that Reger was guilty of an active negligent act and was precluded from any right of indemnity. The decision of our court in Moroni v. Intrusion - Prepakt, Inc., 24 Ill. App. 2d 534, holds to the contrary and is controlling. Our court reviewed the authorities on this question and held that an action between passive and active wrongdoers under the Scaffold Act will lie. In that same case we said:

"The rule against indemnity between tort-feasors does not apply between parties, one of whom is the active and primary wrongdoer and the other bears a passive relationship to the cause of the injury."

This same principle was followed in Boston v. Old Orchard Business District, Inc., 26 Ill. App. 2d 324; Robinson v. Jarvis, 26 Ill. App. 2d 485; and Kiszkan v. Great Lakes Carbon Corp., 27 Ill. App. 2d 392. While these cases involve owners or lessees seeking indemnification against active contractors, we think the principal issue is the same.

We think that solely because a party is charged with a violation of the Scaffold Act does not per se mean that a finding against it necessarily makes it guilty of active negligence and precludes, therefore, any remedy. This issue can only be determined by a trial on the merits. We hold that the counterclaim states a cause of action over for indemnity.

The order dismissing the counterclaim of Reger is reversed and the cause remanded with directions to the trial court to overrule Midwest's motion to dismiss the counterclaim.

REVERSED AND REMANDED
WITH DIRECTIONS.

KILEY, P. J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

General No. 60-0-3

ROBERT HYTEN,

Plaintiff,

VS.

WILLIAM J. KLEFFMAN,
Defendant and Third Party
Plaintiff-Appellant,

VS.

CIRCERSPAMER,
Third Party Defendant-
Appellee.

31 I.A. ^{2d} 273

Appeal from the
Circuit Court of
Madison County,
Illinois.

Honorable Harold R. Clark, Judge Presiding.

HOFFMAN, JUSTICE

This case arises on the pleadings and involves the Structural Work Act (Ill. Rev. Stat. 1959, chap. 48, pars. 60 to 69) commonly referred to as the Scaffold Act.

Plaintiff Robert Hyten filed a complaint against defendant William J. Kleffman in which he alleged the following: that defendant was the owner of certain real estate upon which a house was being erected and the plaintiff was performing work upon a scaffold being there used; that

although it was the duty of the defendant then and there to comply with the provisions of the aforesaid Scaffold Act, the defendant wilfully and knowingly failed to so comply in that he permitted the erection of a scaffold that was not constructed in a safe, suitable and proper manner due to an improper base and defective ladder; and that as a direct result of defendant's failure to comply with said statute, plaintiff was caused to fall off the scaffold and sustain personal injuries.

To this complaint, defendant filed a motion to dismiss, and based said motion, in part, upon the fact that plaintiff did not anywhere in his complaint allege that defendant "had charge" of the erection or construction of the building. This motion was denied and defendant ordered to answer.

Defendant answered and then, subsequently, filed a third party complaint (which was later amended) in three counts, against Ciro Erspamer, in which defendant alleged the following: In Count I, that the work was being performed pursuant to an agreement between defendant and Erspamer wherein defendant engaged Erspamer as an independent contractor to do said work; that at no time did defendant control or have a right to control the work to be performed by Erspamer; that the choice of materials used, the construction of scaffolding and the selection of ropes, ladders, tools, equipment was under the sole and exclusive control of

Erspamer; that the scaffold and other equipment referred to in plaintiff's complaint was owned and erected by Erspamer or his agents and servants; that violations of the Scaffold Act, if any, were the primary, active and direct act or omissions of Erspamer, and defendant was, at most, only a passive violator of said Act; and that under such conditions defendant has a common law right to indemnity against Erspamer for any amount plaintiff might recover from defendant. In Count II, defendant pleaded that Erspamer expressly agreed to indemnify and hold defendant harmless for any claims or actions arising out of the work. In Count III, defendant alleged that he was induced to enter into the work contract by Erspamer's false and fraudulent representations that all the work done was fully insured and that defendant would be held harmless for any claims or actions arising out of the work. Defendant prayed, after each Count, for judgment against Erspamer in such amount as might be adjudged against defendant and in favor of plaintiff.

Third party Erspamer filed a motion to dismiss defendant's amended third-party complaint. This motion was allowed, and in its order the court found that there was no just reason for delaying enforcement or appeal therefrom. The appeal from this order is now, therefore, properly before this court.

The pleadings are well drawn and clearly identify the authorities upon which they are based. The complaints stated a cause of action against the landowner under Section 9

of the Scaffold Act as that Act was construed and interpreted in *Kennerly v. Shell Oil Co.*, 13 Ill. 2d 431, 150 N.E. 2d 134. See also *Braden v. Shell Oil Co.*, 24 Ill. App. 2d 252, 164 N. E. 2d 235. Under the Kennerly rule, the trial court quite properly refused to allow the motion to dismiss the complaint. The third-party complaint, however, did, at the time it was filed, state a cause of action. Count I properly pleaded a case against the contractor under the doctrine recently re-enunciated in *Moroni v. Intrusion-Prepakt, Inc.*, 24 Ill. App. 2d 534, 165 N. E. 2d 346 and affirmed in *Easton v. Old Orchard Business District, Inc.*, 26 Ill. App. 2d 324, 168 N. E. 2d 52. This doctrine is that, in scaffolding cases, the rule forbidding contribution between tortfeasors does not apply between the parties when one is the active and primary wrongdoer and the other bears a passive relationship to the cause of the injury. Count II also stated a cause of action on behalf of the owner against the contractor for it contained all the essential elements necessary to recover on an express oral contract of indemnity. Such a contract was specifically upheld in 1923 by the Supreme Court in *Griffiths & Son Co. v. Fireproofing Co.*, 310 Ill. 331, and the theory underlying this decision has never been questioned in any later decision. Count III likewise stated a cause of action for it contained all the elements for an action in tort for fraud and deceit. *Johnston v. Shockey*, 335 Ill. 363; *Tate v. Jackson*, 22 Ill. App. 2d 471, 161 N. E. 2d 156.

For the reasons set forth, the order dismissing the third-party complaint was erroneous and said order is reversed and the cause remanded for further proceedings.

Reversed and Remanded.

Culbertson, F. J., and Scheineman, J., concur.

Publish abstract only.

FILED

JUN 6 - 1961

James R. McLaughlin

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Ad-V 3141

Abstract

A

NO. 11409

(Abstract only)

Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
FEBRUARY TERM, A.D. 1961

1st DIVISION

RUTH HOLMES,
Plaintiff-Appellee,
vs.
JOSEPH LOWY,
Defendant-Appellant,
and CYNTHIA BOUWENS,
Defendant-Appellee.

31 I.A.^{2d} 230

Appeal from the
Circuit Court,
Lake County

McNEAL, J. -

This is an action to recover damages for injuries which plaintiff, Ruth Holmes, incurred when she fell in a restaurant operated by the defendants, Joseph Lowy and Cynthia Bouwens, as partners. In her complaint directed against both partners, plaintiff charged in count I that Joseph Lowy "wrongfully and negligently" caused her to fall, in count II that he "wilfully and wantonly" caused her to fall, and in count III that he "intentionally" caused her to fall.

At the trial plaintiff testified that on April 11, 1955, she was employed as a dispatcher and bookkeeper for a cab company. On the afternoon of that date she went to defendants' restaurant for a cup of coffee. She had with her about \$90 of her employer's money in small bills. She sat on a stool at the counter and had her coffee. Then she took the money out of her purse and commenced to count it preparatory to putting it in her billfold. Defendant Lowy was working behind the counter. He had known plaintiff for many years. Apparently as a joke he grabbed the money. Plaintiff told him to stop, that it was not her money. In trying to get the money away from him she fell

IN THE
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT, NEW YORK
JANUARY TERM, A.D. 1961

311A, 280

Appeal from the
Circuit Court
of the County

Plaintiff-Appellee,
vs.
Defendant-Appellant,
and OTHERS DEFENDERS,
Defendant-Appellee.

WHEAT, J.

This is an action to recover damages for libel and slander. Plaintiff, John Doe, a resident of New York City, is a well-known and successful businessman. Defendant, Jane Smith, is a well-known and successful businesswoman. Plaintiff alleges that Defendant, in her capacity as a partner in the business, caused him to lose his business and reputation. Plaintiff alleges that Defendant, in her capacity as a partner in the business, caused him to lose his business and reputation. Plaintiff alleges that Defendant, in her capacity as a partner in the business, caused him to lose his business and reputation.

On the afternoon of that date she went to defendant's residence for a cup of coffee. She had with her about \$50 of her husband's money in small bills. She sat on a stool at the counter and had her coffee. When she took the money out of her purse and commenced to count it preparatory to putting it in her billfold. Defendant saw her counting the money. He had known plaintiff for many years. Plaintiff as a joke he handed the money. Plaintiff told him to stop, that it was not her money. In trying to get the money away from him she fell.

backward off of the stool, striking a small table, and then hitting the floor. She was dazed by the fall and went to a physician because of pain in her back. Three physicians who had treated and examined plaintiff testified at the trial. One of them, an orthopedic surgeon, testified that in his opinion plaintiff had incurred a ruptured intervertebral disc, that a fusion type of operation should be performed on plaintiff's spine, and that this constituted major surgery, the expenses of which would exceed \$1000. Plaintiff's version of the occurrence was corroborated by witness Granville Grogins.

At the conclusion of plaintiff's case the court directed a verdict for the defendant Cynthia Bouwens, and the trial proceeded as to the defendant Joseph Lowy. He testified that plaintiff fell as she was getting up from the stool, that he had not touched her, and that he had not engaged in any horseplay. The defense also produced some evidence tending to show that witness Grogins was not present at the time plaintiff fell.

At the conclusion of all of the evidence the court directed a verdict for the defendant Lowy as to counts II and III and the cause was submitted to the jury on count I. The jury returned a verdict for plaintiff on count I in the amount of \$10,500. Defendant's post trial motion was denied, judgment was entered on the verdict, and this appeal followed.

Defendant Lowy contends that the verdict is contrary to the manifest weight of the evidence, that the verdict is excessive, that the plaintiff improperly injected insurance into the case, that the court erred in directing a verdict in favor of the co-defendant Bouwens, and that Lowy's attorneys improperly represented him because there was a conflict of interest between him and his insurance carrier.

The rules governing a determination of whether a verdict is manifestly contrary to the weight of the evidence were stated in *Hocker v. O'Klock*, 24 Ill. App. 2d 259, 261:

"The remaining assignment of error by defendants is that the verdicts against them are contrary to the manifest weight of the evidence. The principles governing the analysis of the evidence have been often repeated and are well established. The verdict must be clearly against the preponderance of the evidence, and it is the duty of the Appellate Court not to reverse a verdict on disputed questions of fact, *Baim v. Cadillac Automobile Co. of Illinois*, 169 Ill. App. 540. When the opposite conclusion to that reached by the jury is not clearly evident, the jury's verdict should not be disturbed, *Bogovich v. Schermer*, 16 Ill. App. 2d 197, and some courts have even stated that the necessity of an opposite conclusion must appear from the evidence, *DeLong v. Whitehead*, 11 Ill. App. 2d 330. The question of fact raised by the proof need only be a fair one, *Krug v. Armour & Co.*, 335 Ill. App. 222, or as summarized in one decision, the word "manifest" means "clearly evident, clear, plain, indisputable", *Schneiderman v. Interstate Transit Line*, 331 Ill. App. 143, affirmed 401 Ill. 172."

Applying these principles to the evidence in this case we cannot say that the version of the occurrence presented by plaintiff's evidence is any less credible than the version presented by defendant's evidence, and we cannot say that the jury's verdict was clearly and obviously wrong.

As to the amount of the damages awarded, the medical evidence presented on behalf of plaintiff was undisputed. This evidence was to the effect that plaintiff had incurred a herniated intervertebral disc and that major surgery would be necessary to correct the condition. The assessment of damages is preeminently the function of the jury (*Murphy v. Lindahl*, 24 Ill. App. 2d 461, 472) and the amount set by the jury should not be set aside unless it is clearly the result of prejudice, passion or improper motive (*Tomlinson v. Chapman*, 24 Ill. App. 2d 192, 197). In view of the undisputed medical evidence we cannot say that the verdict in this case was the result of passion, prejudice or improper motive.

With reference to the contention that plaintiff improperly injected insurance into the case, the record shows that plaintiff related that in a conversation with Lowy after she fell he stated that he wanted to make a phone call to find out if plaintiff should go to a certain doctor or if she could go to her own doctor. Also plaintiff

testified that she had another conversation with defendant Lowy in which he told her that if she would change her story and say that she had tripped on a board and that it was not his fault, he would make sure she received a settlement. According to the record, however, there was no objection of any kind to any of this testimony, and no point was made in the post trial motion with reference to the injection of insurance into the case. Whether this evidence did or did not have any tendency to prejudice the jury, the law is settled that if a party has any objection to the admission of certain evidence he should voice his objection at the trial, and if he fails to do so he cannot urge error with respect to such evidence on review. *School Trustees v. Batchelder*, 7 Ill. 2d 178, 185; *Ritter v. Hatteberg*, 14 Ill. App. 2d 548, 556.

As to the defendant Lowy's contention that the court erred in directing a verdict in favor of his co-defendant Bouwens, it is the general rule that a party cannot complain of error which may have been committed with respect to a co-party. See *Clark v. Gitterman*, 337 Ill. App. 390, 86 NE 2d 276; *Chmielewski v. Marich*, 2 Ill. 2d 568; and *Pearman v. Morris*, 15 Ill. App. 2d 486, 494.

Finally, it is contended by defendant Lowy that the attorneys for his insurance company, who defended under a reservation of rights, did not properly represent him during the trial. Our study of the record indicates that he was properly represented and that the issues between the plaintiff and the defendant Lowy were fully and fairly tried. We are not here deciding any questions which may subsequently arise between Lowy and his insurance carrier. See *Welborn v. Illinois Nat. Cas. Co.*, 347 Ill. App. 65, 106 NE 2d 142, 144; and *Karas v. Snell*, 11 Ill. 2d 233.

For the foregoing reasons it is our conclusion that the judgment entered by the Circuit Court of Lake County was correct, and that the judgment should be and it is affirmed.

Judgment affirmed.

SMITH, P.J., and DOVE, J., concur.

Respectfully,
JAMES H. HARRIS, JR.

That the foregoing is true and correct is so stated.

Witness my hand and the seal of said Court this 26th day of June, 1961.

For the foregoing reasons it is my conclusion that the

is true and correct.

See also, 100 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is not necessary to state that the foregoing is true and correct.

Witness my hand and the seal of said Court this 26th day of June, 1961.

That the foregoing is true and correct is so stated.

Witness my hand and the seal of said Court this 26th day of June, 1961.

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FILED
JUN 26 1961

PAUL V. WUNDER
Clerk Appellate Court Second District

✓ 3941
48183

LILLIAN SAFRAN,

Appellee,

v.

REPLOGLE GLOBES, INC., et al.,

On Appeal of Luther I. Replogle,
as Trustee of Replogle Globes, Inc.
Employees' Profit Sharing and
Retirement Trust,

Appellant.

31 I.A. 299

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal is taken from a judgment of the Municipal Court of Chicago for \$2,284.15 in favor of Lillian Safran (hereafter referred to as the plaintiff) against Luther I. Replogle, as Trustee of Replogle Globes, Inc. Employees' Profit Sharing and Retirement Trust, one of two defendants sued herein. Named as the other defendant was Replogle Globes, Inc. (hereafter referred to as the Company), which was dismissed out of the case after the trial.

At the very threshold of the case we are confronted with the question of the jurisdiction of the Municipal Court of Chicago over cases such as the one before us. In United Biscuit Co. v. Voss Truck Lines, 407 Ill. 488, 95 N.E.2d 439, the court says:

"Jurisdiction is the power to hear and determine cases of a specified class. As applied to jurisdiction over the subject matter, we have said: 'As applied to courts, jurisdiction is authority conferred by law to hear and determine controversies concerning certain

subjects. Jurisdiction of the subject matter is the power to hear and determine causes of the general class to which the proceedings in question belong. [Citations.] As applied to a particular controversy, jurisdiction is the power to hear and determine that controversy. [Citations.]" People ex rel. Dorris v. Ford, 289 Ill. 550; McFarlin v. v. McFarlin, 384 Ill. 428."

The Municipal Court of Chicago has only the jurisdiction conferred upon it by statute, and has no general equitable jurisdiction. 14 I.L.P. Courts, sec. 225; People v. Municipal Court, 359 Ill. 102, 109, 194 N.E. 242, 245; People ex rel. Dr. Pierre Chemical Co. v. Municipal Court of Chicago, 297 Ill. App. 431, 17 N.E.2d 999; Barry v. Knight, 296 Ill. App. 277, 288, 15 N.E.2d 999, 1004. It is well established that that when a court has no jurisdiction of the subject matter the court cannot acquire jurisdiction even by the consent of the parties. 14 I.L.P. Courts, sec. 225; People v. Industrial Sav. Bank, 275 Ill. 139, 113 N.E. 937; Rice v. Bogart, 272 Ill. App. 292.

In order to resolve this question it is necessary to consider the pleadings and determine what issues are raised thereby.

The plaintiff's statement of claim alleges, among other things, that the plaintiff on or about October 12, 1953 was employed by the Company as an assistant bookkeeper and as a condition of such employment was required to participate in the Replogle Globes, Inc. Employees' Profit Sharing and Retirement Trust; that the defendant Luther I. Replogle is president and registered agent of the Company, and is also

trustee of the Replogle Globes, Inc. Employees' Profit Sharing and Retirement Trust; and that the trust agreement is in writing and is not available to the plaintiff. It is further alleged that by reason of plaintiff's employment the net value of her share of the said trust as of April 30, 1957 was \$2,102.74 and that by reason of the plaintiff's further employment to and including December 23, 1957 the value of her share had increased approximately \$1,000, the exact amount not being within the knowledge of the plaintiff as the defendants controlled the factors which determine the amount of the accrued appreciation. The plaintiff further alleges that on or about December 23, 1957 she was dismissed from the employ of the Company and at that time was entitled to receive as the value of her share in the said trust \$2,802.95, (\$299.79 having been paid plaintiff on December 10, 1957), and that she demanded that amount, which the defendants refused to pay.

In their answer the defendants admit the employment of the plaintiff and that she as a condition of her employment was a participant in the trust; that the trust agreement was in writing; and that the net value of plaintiff's account in the trust as of April 30, 1957 was \$2,102.74. They deny that the value of her share of the trust was increased by \$1,000. They admit the payment of \$299.79 from the trust, and they deny that the plaintiff is entitled to \$2,802.95 or to any other sum. The second part of the answer sets out section 12 of the trust agreement, which

section provides that if a participant be dismissed for cause he shall be vested with no part of the value of his account unless he has reached basic or optional retirement date, and states: "The decision of the Company as to what constitutes a dismissal for cause shall be final and conclusive against all persons." The answer affirmatively alleges that on December 20, 1957 the plaintiff, while employed by the Company, was guilty of insubordination and wilfully and maliciously struck her immediate superior in the face; that by reason of such conduct plaintiff was dismissed for cause by her employer; and that as a consequence the plaintiff forfeited all right to the value of her account in the trust as she had not reached basic or optional retirement age.

Later the defendants moved to dismiss the action on the ground that it appears on the face of the complaint that the court had no jurisdiction of the subject matter of the action for the reason that the plaintiff was seeking to enforce her alleged rights as a beneficiary under a trust agreement, and that such an action is an action in equity, which lies outside of the jurisdiction of the Municipal Court of Chicago. The plaintiff filed a reply to the answer of the defendants denying all the allegations set out in part two of the answer. The court denied the motion to dismiss.

On the day the trial commenced the defendants renewed their motion to dismiss the action. The case was tried before a

jury, which returned a verdict, general in form, to-wit: "We, the jury, find for the plaintiff." The court dismissed the Company from the case, apparently computed the sum of money which it considered was due the plaintiff and entered judgment in the sum of \$2,284.15 against Luther I. Replogle, as Trustee of Replogle Globes, Inc. Employees' Profit Sharing and Retirement Trust (hereafter referred to as the defendant).

The defendant filed a motion asking that the judgment be vacated and that the action be dismissed on the ground that the court lacked jurisdiction of the subject matter of the action, setting out substantially the same grounds as were set out in the motion to dismiss. In the alternative the defendant asked in his motion for a judgment notwithstanding the verdict or for a new trial, and as grounds for those motions defendant again reiterates section 12 of the agreement and states that the evidence shows that the Company made a decision to discharge the plaintiff for insubordination or misconduct; that under section 12 that discharge was final and conclusive and not subject to review by court or jury unless there was evidence of fraud or bad faith on the part of the Company in making that decision; that there is no issue of fraud or bad faith in the case; and that the question as to whether the plaintiff's conduct amounted to insubordination or misconduct should not have been submitted to the jury. The post-trial motions of the defendant were denied and this appeal followed.

The plaintiff's theory is that the issue as to whether she was dismissed for cause was properly before the jury; that the jury's verdict was not against the manifest weight of the evidence; that the determination of that issue

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of fact did not involve the interpretation of a trust agreement and hence the action is one at law and not in equity; that the defendant's theory that the affirmative defense based upon the language of the agreement that the decision of the Company as to what constitutes dismissal for cause shall be final and conclusive is repugnant to the law of this jurisdiction as declared by the Supreme Court.

The issues raised by the pleadings before the court are as to whether the plaintiff, an employee of the Company and an admitted participant in the Company's profit sharing trust, was at the time the suit was brought a beneficiary of the trust and entitled to receive a proportionate share of the net value of the trust, or whether, because of her alleged dismissal for cause, under section 12 of the trust agreement she was not a beneficiary entitled to receive any money whatever from the trust fund.

At the time the plaintiff was discharged a dispute had occurred in the office of the Company between the plaintiff and the head bookkeeper. The head bookkeeper claimed that the plaintiff struck her in the face with letters held in her hand after an argument concerning the sale of a globe to one of the other employees. The plaintiff claims that she merely brushed the face of the head bookkeeper with letters which she held in her hand and while she was gesticulating during a heated oral argument.

The trust agreement entered into between the

Company and the defendant was in evidence in the case and is before us.

The plaintiff admits that ordinarily the remedies of a beneficiary of a trust against a trustee to declare and enforce his rights are exclusively equitable. In 2 Scott on Trusts, sec. 198, it is said:

"Although the remedies of the beneficiary against the trustee are ordinarily exclusively by a proceeding in equity, there are certain situations in which a remedy at law has been permitted. In these situations the liability of the trustee is definite and clear and no accounting is necessary to establish it. The first situation includes cases where the trustee is under an immediate and unconditional duty to pay money to the beneficiary. The second situation includes cases in which the trustee is under a duty immediately and unconditionally to transfer a chattel to the beneficiary. In other situations it is held by the weight of authority that the remedies of the beneficiary are exclusively equitable. As we have seen, the trustee is not liable in an action at law for breach of contract for his failure to perform his duties under the trust."

In Restatement of the Law of Trusts, Second, sec. 197, it is stated that except as stated in section 198 the remedies of the beneficiary against the trustee are exclusively equitable. Section 198 provides: "Legal remedies of beneficiary: (1) If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." In the comment on that section it is stated that if a trustee is not under a duty to pay money immediately and unconditionally to the beneficiary the beneficiary cannot maintain an action at law.

The plaintiff contends that the money sued for was

money which was immediately and unconditionally due her. The defendant in his pleadings admits that the plaintiff was a participant in the trust, but because of the conditions surrounding her discharge denies that she thereafter was a beneficiary of the trust fund since under the provisions of section 12 whatever rights she had in the fund were divested by the terms of the instrument itself. Had the plaintiff severed her connection with the Company without any dispute which would bring the dismissal under the provisions of section 12, it would seem that there would be no question as to the duty of the defendant to pay the accrued share to the plaintiff and that the plaintiff then would be in a position where an action at law could be maintained. ✓

We were referred to no Illinois case by counsel, nor have we found any, dealing with this exact question. The defendant has cited to us certain cases decided by the courts of New York. //

Hoffman v. Nagler, 134 N.Y.S.2d 335, was an action brought by a union member against trustees of an industry retirement fund for payment of retirement benefits allegedly due because of contributions to the trust fund made by plaintiff's employer. The action was brought in the Municipal Court of the City of New York, a court which, as the Municipal Court of Chicago, has no general equitable jurisdiction. In that case the plaintiff alleged that the defendants were trustees of a fund for the benefit of //

union employees; that under the trust agreement the trustees agreed to pay to the plaintiff, upon the plaintiff's reaching a certain age, a certain sum out of the trust fund; and that the plaintiff has reached such age and is entitled to receive payment. The defendants moved for judgment on the pleadings, based on the court's lack of jurisdiction. The plaintiff made the same argument as does the plaintiff here, to-wit, that the complaint sets forth an action at law for money had and received. The court holds that it is clear from the complaint that the rights of the plaintiff, if any, are predicated on the theory that he is a beneficiary of the trust fund and that his remedies against the trustee to enforce and declare his rights are exclusively equitable, citing Restatement of the Law of Trusts, sec. 197; 2 Perry on Trusts (7th Ed.), sec. 843; and 2 Scott on Trusts, sec. 198. The court discusses the exception to the rule when the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, and says: "It would appear then that the rule is that unless some definite and clear legal debt has been created between the parties, or some engagement, the nonperformance of which may be the subject of damages at law, a court of equity is the only tribunal to which the beneficiary of a trust can have recourse or redress."

In Milberg v. Nagler, 191 N.Y.S.2d 821, the plaintiff, as a purported beneficiary of a trust fund, brought an action in the Municipal Court of the City of New York to declare

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and enforce his right in a trust fund established by a collective bargaining agreement. That court denied defendants' motion to dismiss the complaint and from that ruling the appeal was taken. On appeal the court stated that a consideration in determining whether a trust had been created is the intention of the parties, citing 1 Scott on Trusts, 2d Ed., sec. 12.2, and held that from a reading of the provisions of the agreement relating to the establishment of the retirement fund it was evident that the creation of a trust was intended, hence the plaintiff seeking to recover payments out of the trust fund must establish that he is a beneficiary of the trust, and an adjudication with respect thereto involves a construction of the trust agreement. The court says: "Until there is a determination that plaintiff is a beneficiary of the trust, the legal obligation, if any, of the members of the Retirement Board to make payments to plaintiff out of the fund cannot be ascertained. The instant action is fundamentally and essentially one to declare and enforce the rights of plaintiff in a trust fund, as a purported beneficiary thereof." The court further holds that such an action can only be brought in a court having equitable jurisdiction, and holds that the complaint should be dismissed.

A reading of the agreement before us indicates without the shadow of a doubt that a trust was created. Once a trust is created it is thereafter to be treated as a trust. Smith

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v. Kelley, 387 Ill. 213, 226, 56 N.E.2d 360, 366. It is admitted by the defendant that the plaintiff was a participant in the trust fund, but the defendant denies that the plaintiff at the time the suit was brought in the Municipal Court of Chicago was a beneficiary of the trust fund due to the fact that under section 12 of the trust agreement her alleged dismissal for cause terminated her rights as a beneficiary, and also on the further ground that the same section of the agreement makes the decision of the Company final and conclusive as against all participants in the fund. In order to succeed in her claim the plaintiff must first establish that she, at the time of suit, was a beneficiary of the trust fund, and that cannot be done without recourse to the trust agreement and an interpretation thereof. The trial court in the instant case eliminated the provision which makes the decision of the Company final. The plaintiff in this court argues that such a provision in a trust agreement such as the instant one is so unreasonable that it will not be enforced by the courts. To determine that question would require an analysis of the cases and a reading and interpretation of the trust agreement. Such a determination is one reserved for a court of equity.

The plaintiff argues that the verdict

-12-

is conclusive since the defendant does not contend that it was against the manifest weight of the evidence. She asserts that the finding of the jury should be interpreted as meaning that she was not dismissed for a cause falling within the purview of section 12 of the agreement and consequently any question dealing with that phase of the case is not properly before us. The answer to this contention is that the defendant contended in the trial court, and also contends here, that the trial court, lacking jurisdiction to try the case, could make no finding during the trial which could have any effect whatsoever upon the defendant's right to have the cause of action dismissed.

There is no need to discuss or make any finding on other questions raised here. The case in our opinion involves an interpretation of a trust agreement. The Municipal Court of Chicago had no jurisdiction to make such interpretation, and the cause should have been dismissed. The judgment of the Municipal Court of Chicago is reversed, and the cause is remanded with directions to dismiss the statement of claim.

Reversed and remanded.
with directions.

Schwartz, P.J., and Dempsey, J., concur.

Abstract only.

NO. 61-0-5

31 I.A.^{2d} 337

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

TOMMIE C. COLE,

Plaintiff-Appellant,

-vs.-

FANNIE COLE,

Defendant-Appellee.

)

) APPEAL FROM THE

) CITY COURT OF

) EAST ST. LOUIS

)

O P I N I O N

SCHEINEMAN, J.

The City Court of the City of East St. Louis entered an order granting a temporary injunction without notice and without bond restraining the defendant herein from proceeding with a partition suit then pending in the Circuit Court of St. Clair County. Thereafter the defendant entered a special appearance and moved to dissolve the injunction as being improvidently issued, which motion was denied.

The Statute on Injunctions, Ch. 69, Ill. Rev. St., Sec. 3, provides as follows: "No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice."

The plaintiff herein made no attempt whatsoever to comply with the requirements of this statute, therefore the injunction should not have been issued in the first place and the motion to dissolve should have been allowed. The order is reversed and the cause remanded with directions to dissolve the injunction and then to proceed according to law.

¶ Reversed and remanded.

¶ Culbertson, P.J., and Hoffman, J. concur.

Abstract.

2.

FILED
JUN 25 1931
James R. McLaughlin
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

NO. 61-0-5

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

TOMMIE C. COLE,

Plaintiff-Appellant,

-vs.-

FANNIE COLE,

Defendant-Appellee.

)

) APPEAL FROM THE

) CITY COURT OF

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O P I N I O N

SCHEINEMAN, J.

The City Court of the City of East St. Louis entered an order granting a temporary injunction without notice and without bond restraining the defendant herein from proceeding with a partition suit then pending in the Circuit Court of St. Clair County. Thereafter the defendant entered a special appearance and moved to dissolve the Injunction as being improvidently issued, which motion was denied.

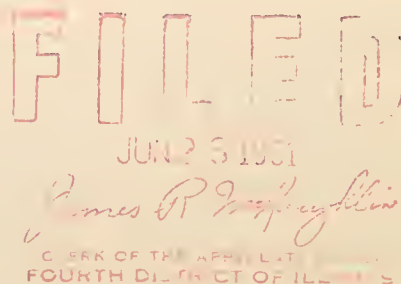
The Statute on Injunctions, Ch. 69, Ill. Rev. St., Sec. 3, provides as follows: "No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice."

The plaintiff herein made no attempt whatsoever to comply with the requirements of this statute, therefore the injunction should not have been issued in the first place and the motion to dissolve should have been allowed. The order is reversed and the cause remanded with directions to dissolve the injunction and then to proceed according to law.

Reversed and remanded.

Culbertson, P.J., and Hoffman, J. concur.

Abstract.



48347

WAYNE NEUBAUER, an infant,
by EMIL D. NEUBAUER, his
father and next friend,

Plaintiff-Appellant,

v.

WESLEY DUSZAK and FLORENCE
DUSZAK,

Defendants-Appellees,

WESLEY DUSZAK, JR. and ROBERT
DUSZAK,

Third Party Defendants-
Appellees.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

31 I.A.^{2d} 456

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED
THE OPINION OF THE COURT.

On February 4, 1960 the above case was called for trial and no one appearing for defendants, the court entered an order reciting that the case having been called for trial on January 26, 1960, again on January 27, 1960 and again on February 4, 1960, and no one responding for defendants, and it further appearing to the court that the attorney of record for defendants had been dead for several years and that no attorney of record had appeared, the court adjudged defendants in default. A jury was impaneled, evidence heard and a verdict for \$30,000 rendered against defendants. Thereupon, the court entered a judgment in that amount.

On September 14, 1960 plaintiff commenced a supplementary proceeding to reach defendants' assets. On September 28, 1960 defendants entered their appearance and on September 30, 1960 presented a petition by their attorney, seeking to set

aside the judgment and to dismiss the supplementary proceedings. The petition was not verified. It charged that the attorney who had represented defendants had died in 1955 and that no attorney in his office assumed the burden of defense; that this was not known to defendants, but was known to plaintiff's counsel; that plaintiff's claim was dismissed for want of prosecution on May 6, 1955 and again on September 17, 1958; that on both occasions the suit was reinstated; that defendants did not get notice of the second reinstatement; that the attorney for plaintiff had taken undue advantage of defendants; that they did not know of the proceedings; that a registered letter dated September 1960 which related to the supplementary proceedings to discover assets was the first notice defendants had of the judgment. It charged that plaintiff by superior knowledge of the law took advantage of defendants who were not represented by counsel and that defendants were ignorant of the law and all its weighty manifestations. The petition is signed by their attorney.

To that petition plaintiff filed an answer with supporting affidavits and exhibits, charging deliberate misrepresentation by defendants of material facts, and averring that on November 20, 1957 defendants were sent written notice to their home address, telling them of the death of their former lawyer and asking that they come to plaintiff's attorney's office at a convenient time. A copy of that letter was attached to the answer as Exhibit "A."

Pursuant to the letter, defendant Florence Duszak did go to the office of plaintiff's lawyer and there was warned of the consequences if she did not procure a lawyer immediately and attend to the case. Counsel for plaintiff did not hear from defendants.

Again, in December 1958, as appears from the affidavit of counsel for plaintiff, both defendants appeared at his office pursuant to a notice to take depositions and there conferred at length concerning the death of their lawyer, their failure to procure counsel, the seriousness of their position, and their right to examine medical reports and the injured party. They agreed to employ counsel and return. Counsel for plaintiff then refrained from the taking of depositions. A letter summarizing their conference was mailed to defendants by plaintiff's attorney and a copy is attached to the answer.

It appears that in September 1958 the suit had been dismissed for want of prosecution. Defendants allege that they were not notified of the dismissal of the complaint nor were they notified of the reinstatement. An affidavit of the attorney for plaintiff in support of plaintiff's answer asserts that he learned that the suit had been dismissed when his associate counsel failed to answer the call; that he immediately prepared and had his secretary serve notice on defendants of the motion to vacate the order of dismissal, which notice was mailed to them in accordance with the rules of court, at their residence. A copy of the notice and affidavit of service by mailing is attached to the answer.

Counsel for plaintiff points out that the petition does not deny the receipt of notice of the motion to vacate the order dismissing the case, but alleges that defendants did not receive notice of the order of reinstatement.

No counter-affidavit having been filed controverting the matters set up in the affidavits supporting the answer to the petition, the facts stated in the affidavits should be taken as true. Leitch v. Hine, 393 Ill. 211, 66 N.E.2d 90; Winston v. Zoning Board of Appeals, 407 Ill. 588, 95 N.E.2d 864; Daviditis v. National Bank of Mattoon, 6 Ill. App. 2d 286, 288, 127 N.E.2d 462, 463; Coutrakon v. Distenfield, 21 Ill. App. 2d 146, 162, 157 N.E.2d 555, 563.

Defendants seem to be unaware of the true nature of the proceeding. They rely upon the case of Widicus v. Southwestern Electric Cooperative, Inc., 26 Ill. App. 2d 102, 167 N.E.2d 799, and a discussion in the opinion in that case of an amendment to the Practice Act with respect to a default being set aside "upon any terms and conditions that shall be reasonable." The Widicus case involved a motion to vacate made within the thirty days. A very different situation applies upon expiration of the thirty day period. Then judgments and decrees, while subject to review on appeal, are otherwise stable, except as to those extraordinary cases of fraud, accident, mistake, error apparent on the face of the record and circumstances of a kindred nature. These are provided for in Section 72 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, § 72 (1959)). Under

that act, writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review were abolished and the relief theretofore obtainable was to be obtained by a petition to be filed in the same proceeding as that in which the judgment was procured, but was not to be a continuation thereof.

The circumstances under which this relief might be granted was fully reviewed in Till v. Kara, 22 Ill. App. 2d 502, 161 N.E.2d 363. There, the court, after holding that the petition must show due diligence and a meritorious defense, said, at pp. 511-12, 161 N.E.2d at pp. 367-68:

"While the trend of judicial decision may be, as defendants contend, to determine suits upon their rights and according to the substantive rights of the parties, when a party is sued and process duly issued and regularly served as provided by law and orderly procedure and practice is observed, a party must be governed by the law and rules of practice and must present his defense if he desires to contest the demand of the plaintiff for judgment, Bernier v. Schaefer, 11 Ill. 2d 525, Marnik v. Cusack, 317 Ill. 362. A motion of the kind here presented, seeking to set aside a final judgment of a court having jurisdiction of the parties and the subject matter, is one of serious import and if treated lightly, threatens the stability of our courts. Conrad v. Camphouse, 230 Ill. App. 598."

The legislature, when it substituted a petition under Section 72 for those extraordinary writs and proceedings formerly used, directed that the petition must be supported by affidavit or other appropriate showing as to matters not of record. The petition in the instant case was not so supported, although it relies on matters not of record.

An examination of cases in which Section 72 has been invoked reveals that where there were matters not of record, the

petition was verified or supported by affidavit. Ellman v. De Ruiter, 412 Ill. 285, 106 N.E.2d 350 (1952); Lichter v. Scher, 4 Ill. App. 2d 37, 39, 123 N.E.2d 161, 162 (1954); Paramount Paper Tube Corp. v. Capital Engineering & Manufacturing Co., 11 Ill. App. 2d 456, 138 N.E.2d 81 (1956); Jansma Transport, Inc. v. Torino Baking Co., 27 Ill. App. 2d 347, 169 N.E.2d 829 (1960). In Ellman v. De Ruiter, supra, the leading case on this subject, the ground for the vacation of the judgment was the deceptive conduct of the attorneys for the plaintiff, which misled and lulled the defendant until the expiration of the thirty day period. In Lichter v. Scher, supra, the ground upon which the petition to vacate rested was that there had been no service of summons. In Paramount Paper Tube Corp. v. Capital Engineering & Manufacturing Co., supra, the defendants were defaulted for failure to file an answer. It appeared by verified petition filed by the defendants that on the morning on which the answer was due they had left their answer with the clerk of the court at or before 10:00 a.m. In Jansma Transport Co. v. Torino Baking Co., supra, a default was entered for want of appearance and judgment had thereon. Upon a motion to vacate made more than thirty days after the entry of judgment, a verified petition was filed and subsequently, an answer and reply. The propriety of the service of summons and the conduct of the plaintiffs' attorneys, who were collaborating with the defendant's counsel as in Ellman v. De Ruiter, supra, were the issues raised. The trial court heard the testimony, found for the defendant and set

aside the judgment.

In the instant case the petition is signed by a lawyer who has no firsthand knowledge of the matter, is unsworn, and makes charges largely immaterial and unsupported by the record or verified document. On the other hand, the affidavits submitted by plaintiff are clear, explicit and complete. They establish that the attorney for plaintiff by letters, notices and word of mouth apprised defendants of the prosecution of the case, but defendants persisted in a stubborn refusal to employ a lawyer or look after their defense.

Courts are and should be reluctant to enter or sustain default judgments, but there is a limit beyond which such action is wholly incompatible with the preservation of stability in the final orders of a court.

The order vacating the judgment is reversed.

Order reversed.

McCormick and Dempsey, JJ., concur.

Abstract only.

48472

HIRES BOTTLING COMPANY OF CHICAGO,
an Illinois corporation,
Plaintiff-Appellee,

vs.
CONSOLIDATED FOODS CORPORATION,
etc., et al,
Defendants Below,

On Appeal of CONSOLIDATED FOODS
CORPORATION, a Maryland corporation,
Appellant.

INTERLOCUTORY

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY

31 I.A. 467

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order for a temporary injunction, ILL. REV. STAT. ch. 110, § 78 (1959), restraining Consolidated from interfering with plaintiff's exclusive franchise for bottling Hires Root Beer.

Plaintiff, Hires Company of Chicago, was granted the franchise by the Hires Company of Philadelphia in December 1951. In November 1960, defendant, Consolidated Foods Corp., acquired the assets of the Hires Company of Philadelphia. On December 6, 1960, Consolidated wrote plaintiff that it was not adequately performing its franchise obligations and called for "substantial improvement" under threat of permitting "other persons to sell" Hires Root Beer in plaintiff's territory. February 8, 1961, Consolidated again wrote plaintiff that it was in default under the franchise and called upon it "to comply . . . or to cease or correct these defaults within the 15-day period" otherwise "the agreement shall . . . become terminated."

On February 23, 1961, plaintiff filed its complaint for a permanent injunction and damages and applied for a temporary injunction. Defendants answered the following day. Hearing on

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the application for injunction was "limited at this time . . . [to] Consolidated" On March 21, 1961, the order appealed from was entered, restraining Consolidated from "authorizing, aiding or permitting in any way, directly or indirectly, any person, firm, association, partnership or corporation other than plaintiff to carbonate Hires in bottles" within the territory.

The decisive question is whether the Chancellor abused his discretion in ordering the temporary injunction. Weingart v. Weingart, 23 Ill. App. 2d 154, 158 (1959). Consolidated raises several points in this court which we shall not discuss. In our opinion, after considering the points, they present no bar to the exercise of the Chancellor's discretion in preserving the status quo until a full hearing at which the points made may be resolved.

The Chancellor was vested with broad discretion in granting the temporary injunction. Arends v. Naughton, 11 Ill. App. 2d 227, 236 (1956). This is especially true here because the injunction was issued upon the pleadings after a hearing and upon the giving of bond. Aurora v. Warner Bros. Pictures Dist. Corp., 16 Ill. App. 2d 273, 285 (1958); Shatz v. Paul, 7 Ill. App. 2d 223, 235 (1955). Plaintiff is required only to show prima facie a fair question as to the need of the injunctive relief, and circumstances leading to a belief that he probably would be entitled to relief if the proof sustained the allegations. Aurora v. Warner Bros. Pictures Dist. Corp., 16 Ill. App. 2d 273, 284 (1958). Where the sole object for the temporary injunction

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sought is the maintenance of the status quo until the question of the right between the parties can be decided on final hearing, the injunction is properly allowed or maintained even where there may be a serious doubt as to the ultimate success of the complaint. Fishwick v. Lewis, 258 Ill. App. 402, 409 (1930).

The main issue on the decisive question, made by the pleading, was whether Consolidated had the right, on the facts alleged, to terminate the franchise on the ground that plaintiff did not "adequately supply the public demand . . . for Hires . . . and . . . use its best efforts to increase sales. . . ." The complaint referred to the two franchise agreements which were attached as exhibits, the original dated December 3, 1951 and the "Agreement Settling Dispute of Purported Breach of Franchise" dated December 26, 1958. The latter agreement modified part of the original Paragraph 12 which gave either party the right to end the agreement without cause upon 60 days notice. The right of the licensor to cancel upon 60 days notice was limited to causes specified in the original contract. Also, it required giving to plaintiff and Arthur Holland 15 days "to comply . . . and to cease or to correct . . ." violations and provided for termination of the franchise should there be failure to comply, cease or correct within 15 days. This modification was to be effective "so long as Arthur Holland, his wife, his son and his brother, . . . individually or jointly controlled the ownership" of plaintiff. Arthur Holland is now in control.

The main issue made in the testimony was whether plaintiff

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had or had not adequately supplied the public demand for Hires and used its best efforts to increase sales. On the evidence before him the Chancellor was entitled to find prima facie that in the spring of 1960 plaintiff had negotiated with the Squirt Bottling Company of Chicago with respect to a transfer of the franchise; that on two occasions Peter Hires of the Hires Company of Philadelphia deliberately avoided conference with its Chicago agent and plaintiff; that in the fall of 1960 Consolidated, in order to protect "ourselves" as new owners, discussed with Squirt the handling of Hires in plaintiff's "territory"; that Consolidated discussed its rights under the franchise with its attorneys and also discussed plaintiff's performance under the franchise; and that there were no complaints to plaintiff about its performance prior to December 1960.

The Chancellor could have further inferred prima facie that in the letter of February, Consolidated imposed upon plaintiff an unreasonable burden because it expected plaintiff to "get Hires into" all of the more than 200 stores it listed as not being served by plaintiff; that plaintiff's performance was not as inadequate as Consolidated made it appear; that its performance would have been better except for lack of cooperation on the part of the licensor in advertising and promotion; and that plaintiff used its best efforts to increase sales in the face of a poor and highly competitive Chicago soft drink market after there had been a formula change in Hires which hurt sales.

The Chancellor could have concluded that denial of the

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temporary injunction would effectively destroy plaintiff's business in the territory and the granting of it would probably not put Consolidated in a worse business position in the territory than it was in 1960, and would probably improve it. We cannot say on this record that this conclusion would be unreasonable. This is an important consideration. Weingart v. Weingart, 23 Ill. App. 2d 154, 161 (1959).

We think there is no showing made that the Chancellor abused his discretion in granting the temporary injunction, cf. Citizens National Bank of Chicago v. Grossman, 21 Ill. App. 2d 573, 574 (1959), and it is hereby affirmed.

AFFIRMED.

MURPHY, C.J., Concurs
BURMAN, J. took no part.

Abstract

84223

